

N. 2894
No. 14401

United States
Court of Appeals
for the Ninth Circuit

VICTOR G. LANDS,

Appellant,

vs.

KYLE Z. GRAINGER, JR., Trustee in Bankruptcy
of Estate of Universal Produce Company,
Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division.

FILED

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PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee:

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Los Angeles 14, Calif.

In the United States District Court, Southern
District of California Southern Division

No. 3433

In the Matter of

UNIVERSAL PRODUCE COMPANY,
a California Corporation,
Alleged Bankrupt.

PETITION FOR INVOLUNTARY
BANKRUPTCY

To the Honorable Judges of the United States Dis-
trict Court, Southern District of California,
Southern Division :

The petition of Walter Verhelen Co., a co-partner-
ship, consisting of Walter Verhelen and Walter Ver-
helen, II ; Riley Atkinson & Co., an Idaho corpora-
tion; and F. H. Woodruff & Sons, Inc., a corpora-
tion doing business in California, respectfully
represents :

I.

That Universal Produce Company, a California
corporation, has had its principal place of business at
541 J. Street, San Diego, California, within the above
judicial district, for a longer portion of the six (6)
months immediately preceding the filing of this
petition than in any other judicial district; and owes
debts to the amount of One Thousand Dollars (\$1,-
000.00) or more; and is not a municipal railroad,
insurance or banking corporation, or a building and

loan association, but is engaged in the commission brokerage and merchandising business. [2*]

II.

Your petitioners are creditors of the said Universal Produce Company, a California corporation, having provable and unsecured claims against it, liquidated as to amount and not contingent as to liability, amounting in the aggregate to Five Hundred Dollars (\$500.00) or over, in excess of securities.

III.

That the nature and amounts of your petitioners' claims are as follows:

a. The claim of your petitioner, Walter Verhelen Co., a copartnership, consisting of Walter Verhelen and Walter Verhelen, II, is in the amount of Four Thousand Three Hundred Ninety-seven and eighty one/hundredths Dollars (\$4,397.80), for goods, wares and merchandise furnished by it to the said Universal Produce Company, a California corporation.

b. The claim of your petitioner, F. H. Woodruff & Sons, Inc., a corporation, doing business in California, is in the amount of Nine Thousand Four Hundred Fifty-one and nine one/hundredths Dollars (\$9,451.09), for goods, wares and merchandise furnished by it to the said Universal Produce Company, a California corporation.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

c. The claim of your petitioner, Riley Atkinson & Co., an Idaho corporation, is in the amount of Eight Thousand Forty-two and fifty-nine one/hundredths Dollars (\$8,042.59), for goods, wares and merchandise furnished by it to the said Universal Produce Company, a California corporation.

IV.

That within four months next preceding the filing of this petition, the said alleged bankrupt on December 3, 1952, and December 12, 1952, respectively, concealed, removed or permitted to be concealed or removed a portion of its property, to wit, the sum of \$10,000.00 with intent to hinder, delay or defraud its creditors or any of them, or made or suffered a transfer of its [3] property, to wit, the sum of \$10,000.00 on December 3, 1952, and December 12, 1952, to Victor G. Lands, which transaction is fraudulent under the provisions of Section 67 and Section 70 of the Bankruptcy Act.

That within four months next preceding the filing of this petition, the said alleged bankrupt on December 3, 1952, and December 12, 1952, respectively, transferred, while insolvent, a portion of its property to wit, the sum of \$10,000.00 to Victor G. Lands, with intent to prefer the said Victor G. Lands over its other creditors, or made or suffered a preferential transfer to the said Victor G. Lands, as defined in subdivision (a) of Section 60 of this Act.

Wherefore, your petitioners pray that service of this petition with a subpoena may be made upon

said Universal Produce Company, a California corporation, as provided in the Bankruptcy Act, and that it may be adjudged by the Court to be a bankrupt within the purview of the said Act.

WALTER VERHELEN CO.,
A Co-Partnership, consisting of Walter Verhelen
and Walter Verhelen, II;

By /s/ SAMUEL S. BLOOM,
Agent and Attorney-in-Fact;

RILEY ATKINSON & CO.,
An Idaho Corporation;

By /s/ SAMUEL S. BLOOM,
Agent and Attorney-in-Fact;

F. H. WOODRUFF & SONS,
INC.,
A Corporation, Doing
Business in California;

By /s/ SAMUEL S. BLOOM,
Agent and Attorney-in-Fact.

QUITTNER & STUTMAN,
By /s/ WILLIAM J. TIERNAN,
Attorneys for Petitioning
Creditors.

Duly verified.

[Endorsed]: Filed January 16, 1953. [4]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 1st day of May, 1953;

Whereas, a petition was filed in this court on the 16th day of January, 1953, against Universal Produce Company, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to Reuben G. Hunt, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Universal Produce Company shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

May 1st, 1953.

/s/ BEN HARRISON,
District Judge.

[Endorsed]: Filed May 1, 1953. [6]

[Title of District Court and Cause.]

PETITION TO RECLAIM PROPERTY

To Edward T. Lannon, Esq., Referee in Bankruptcy.

The petition of Victor G. Lands respectfully represents:

I.

On or about the 16th day of January, 1953, a petition in involuntary bankruptcy was filed against the above-named alleged bankrupt.

II.

John R. Hellen is the duly appointed, qualified and acting receiver of the property of the above-named alleged bankrupt.

III.

Said receiver has in his possession the following described property, belonging to your petitioner:

\$10,000.00 in cash which said receiver obtained from the firm of Yeckes-Eichenbaum of New York City, New York, as partial payment for certain railroad cars of peas grown in Mexico by the above-named alleged bankrupt and shipped by it to said firm. [7]

IV.

Petitioner is the owner and is entitled to immediate possession of the said \$10,000 in cash.

V.

On or about the 6th day of February, 1953, petitioner duly demanded from said receiver the sur-

render to petitioner of said property and said receiver has failed and refused and still fails and refuses to surrender the same and to comply with said demand.

Wherefore, petitioner prays that said receiver, John R. Hellen, be directed to surrender possession of said property, to wit, the said \$10,000 in cash, to petitioner, and that your petitioner have such other and further relief as is just and proper.

/s/ VICTOR G. LANDS,
Petitioner.

/s/ VIVIAN M. FELD,
Attorney for Petitioner.

[Endorsed]: Filed March 9, 1953, Referee. [8]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
RE PREFERENCE AND FRAUDULENT
CONVERSION

Comes now your petitioner, Kyle Z. Grainger, Jr., and respectfully represents and shows the Referee:

I.

Your Petitioner is the duly appointed, qualified and acting Trustee of the above-entitled bankrupt estate.

II.

The Respondent, Victor G. Lands, was at all times mentioned herein and at all times material, an of-

ficer, director and shareholder of the bankrupt corporation.

III.

In October, 1952, Respondent Victor G. Lands, loaned to the bankrupt corporation the sum of \$20,000.00 on an unsecured basis and became thereby a creditor of the bankrupt corporation.

IV.

The said Victor G. Lands has filed in the within bankruptcy a petition to reclaim property, alleging that he is the owner of a quantity of cash which is the property of this estate. [9]

Subsequent to the loan of the \$20,000.00 as aforesaid, the Respondent, Victor G. Lands, transferred or caused to be transferred to himself on December 3, 1952, the sum of \$5,000.00, and on December 12, 1952, a further sum of \$5,000.00, or a total sum of \$10,000. The moneys were transferred by check drawn by Victor G. Lands on the corporation bank account. Your petitioner alleges that these transfers of funds constituted a preference to the said Victor G. Lands under Section 60a of the Bankruptcy Act.

VI.

Petitioner alleges that in addition to the sum of \$10,000.00 as aforesaid, the said Victor G. Lands transferred other and additional sums to himself and made further transfers of property of the corporation to himself and that the said transfers and conveyances constituted preferences under Section 60a of the Bankruptcy Act.

Second Claim

I.

Petitioner repeats and realleges paragraphs I, II, III, and IV of the first claim and makes them a part of the second claim as though fully set forth herein.

II.

Petitioner alleges that on or about December 3, 1952, Respondent Victor G. Lands, transferred the sum of \$5,000.00 of the bankrupt's funds to himself; that on or about December 12, 1952, said Victor G. Lands transferred an additional \$5,000.00 and thereafter other portions of the bankrupt's funds and properties to himself on other occasions.

III.

Petitioner alleges that there was no consideration paid to the bankrupt corporation at the time of these transfers and conveyances and the said transfers and conveyances were made at a time when the corporation was solvent or as a result of these [10] said transfers and conveyances would be rendered insolvent or unable to pay its debts as they matured.

IV.

Petitioner alleges that the true and exact financial condition of the company was well-known to the Respondent Victor G. Lands and that the said transfers and conveyances were and are fraudulent as against the creditors of this estate and this petitioner as Trustee herein elects to void the said transfers and conveyances.

Wherefore, petitioner prays that this Court issue

its Order to Show Cause upon reading and filing this Petition, requiring the said Victor G. Lands to come into court at a time and place then and there to show cause, if any he has, why an Order should not be made ordering and directing him to forthwith turn over to your petitioner the sum of \$10,000.00 and any other sums so transferred, in accordance with the election of the petitioner, together with interest on said sums as allowed by law.

/s/ KYLE Z. GRAINGER, JR.,
Trustee.

QUITTNER AND STUTMAN,

By /s/ WILLIAM J. TIERNAN.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 3, 1953, Referee. [11]

[Title of District Court and Cause.]

ANSWER TO PETITION FOR ORDER TO
SHOW CAUSE RE PREFERENCE AND
FRAUDULENT CONVERSION

Comes now the respondent, Victor G. Lands, and in answer to the petition of Kyle Z. Grainger, Jr., admits, denies and alleges as follows:

Answer to First Claim

I.

In answer to Paragraph III, respondent admits that in October, 1952, he loaned to the bankrupt cor-

poration the sum of \$20,000 and thereby became a creditor of said corporation. Except as expressly admitted, respondent denies generally and specifically each and every, all and singular, the allegations contained in said paragraph; denies that he made said loan on an unsecured basis.

II.

In answer to Paragraph IV, respondent admits that he had filed a petition to reclaim property alleging that he is the owner of a quantity of cash which is being held by the trustee of said bankrupt estate; denies that said cash is the property of this [13] estate.

III.

In answer to Paragraph V, respondent admits that \$10,000 of said loan of \$20,000 has been repaid to him. Except as expressly admitted, respondent denies generally and specifically each and every, all and singular, the allegations contained in said Paragraph V.

IV.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph VI.

Answer to Second Claim

I.

Respondent refers to Paragraphs I and II of his answer to first claim, makes them a part hereof and incorporates them herein as though fully set out at length herein in answer to Paragraph I.

II.

In answer to Paragraph II, respondent admits that in December, 1952, he was repaid the sum of \$10,000. Except as expressly admitted, respondent denies generally and specifically each and every, all and singular, the allegations contained in said paragraph.

III.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph III.

IV.

Denies generally and specifically each and every, all and singular, the allegations contained in Paragraph IV.

Wherefore, respondent prays that petitioner take nothing by his petition and for such other and further relief as to the court may seem proper.

/s/ VIVIAN M. FELD,
Attorney for Respondent.

/s/ VICTOR G. LANDS,
Respondent.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1953, Referee. [14]

[Title of District Court and Cause.]

ANSWER TO PETITION TO
RECLAIM PROPERTY

Comes Now Kyle Z. Grainger, Jr., Trustee, in the within matter and for Answer to the Petition of Victor G. Lands to reclaim property, admits, denies and alleges as follows:

1. In answer to paragraph IV of the said Petition, denies each and every allegation thereof.

First Defense

I.

Victor G. Lands was at all times mentioned herein and at all times material, an officer, director and shareholder of the bankrupt corporation.

II.

In October, 1952, Victor G. Lands loaned to the bankrupt corporation the sum of \$20,000.00 on an unsecured basis and became thereby a creditor of the bankrupt corporation.

III.

Subsequent to the loan of the \$20,000.00 as aforesaid, the Victor G. Lands transferred or caused to be transferred to himself on December 3, 1952, the sum of \$5,000.00 and on December 12, 1953, a further sum of \$5,000.00, or a total [16] sum of \$10,000.00. The moneys were transferred by check drawn by Victor G. Lands on the corporation bank account. Your petitioner alleges that these transfers of funds

constituted a preference to the said Victor G. Lands under Section 60a of the Bankruptcy Act.

IV.

Petitioner alleges that in addition to the sum of \$10,000.00 as aforesaid, the said Victor G. Lands transferred other and additional sums to himself and made further transfers of property of the corporation to himself and that the said transfers and conveyances constituted preferences under Section 60a of the Bankruptcy Act.

Second Defense

I.

Petitioner alleges that on or about December 3, 1952, Victor G. Lands transferred the sum of \$5,000.00 of the bankrupt's funds to himself; that on or about December 12, 1952, said Victor G. Lands transferred an additional \$5,000.00 and thereafter other portions of the bankrupt's funds and properties to himself on other occasions.

II.

Petitioner alleges that there was no consideration paid to the bankrupt corporation at the time of these transfers and conveyances and the said transfers and conveyances were made at a time when the corporation was solvent or as a result of these said transfers and conveyances would be rendered insolvent or unable to pay its debts as they matured.

III.

Petitioner alleges that the true and exact financial condition of the company was well known to Victor

G. Lands and that the said transfers and conveyances were and are fraudulent as against the creditors of this estate and this petitioner as Trustee herein elects to void the said transfers and conveyances.

Wherefore, this Trustee prays that the Court dismiss the [17] Petition in Reclamation and that this Court enter a Judgment in favor of this estate and against the said Victor G. Lands in the sum of \$10,000.00.

/s/ KYLE Z. GRAINGER, JR.,

QUITTNER AND STUTMAN,

By /s/ WILLIAM J. TIERNAN.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1953. [18]

[Title of District Court and Cause.]

AMENDMENT TO PETITION FOR ORDER TO
SHOW CAUSE RE PREFERENCE AND
FRAUDULENT CONVERSION

Comes now your petitioner, Kyle Z. Grainger, Jr., and respectfully represents and shows to the referee as an amendment to the above petition:

Third Claim

I.

Petitioner repeats and realleges paragraphs I, II, III, and IV of the first claim and makes them a part of the third claim as though fully set forth herein.

II.

That the withdrawal in the sum of \$10,000.00 as aforesaid by Victor G. Lands was without the authorization or ratification of the board of directors or other shareholders and was in violation of Sections 824, 825, and 826 of the Corporations Code of the State of California, being a withdrawal or distribution of the assets of the corporation to a shareholder.

/s/ KYLE Z GRAINGER, JR.,

QUITTNER AND STUTMAN,

By /s/ WILLIAM J. TIERNAN.

Duly verified.

[Endorsed]: Filed September 11, 1953, [20]
Referee.

[Title of District Court and Cause.]

MEMORANDUM OPINION RE STATUS
OF DR. VICTOR G. LANDS

Quittner & Stutman, Attorneys for Trustee.

Vivian M. Feld, Attorney for Dr. Victor G. Lands.

Petition in reclamation of Dr. Victor G. Lands.
Petition of Trustee to recover from Dr. Lands alleged preferences or fraudulent transfers.

I.

Statement of the Case

This is an involuntary bankruptcy commenced January 16, 1953. An adjudication in bankruptcy

was made on June 16, 1953. On January 19, 1953, John H. Hellen was appointed and qualified as Receiver in Bankruptcy of the estate and acted as such until July 22, 1953, when Kyle Z. Grainger, Jr., was appointed and qualified as Trustee in Bankruptcy.

On March 9, 1953, Victor G. Lands, hereafter referred to as Dr. Lands, filed a petition to reclaim from the estate \$10,000.00 in cash, which the Receiver obtained from the firm of Yeckes-Echenbaum of New York City, New York, as partial [60] payment for certain railroad cars of peas grown in Mexico by the bankrupt and shipped by it to said firm. On August 17, 1953, the Trustee in Bankruptcy filed an answer to said petition in reclamation, asserting that the said Dr. Lands loaned the bankrupt the sum of \$20,000.00 on an unsecured basis and thereby became a general creditor of the bankrupt, but that thereafter he caused to be transferred to him, out of the assets of the bankrupt estate, on December 3, 1952, the sum of \$5,000.00, and on December 12, 1952, another sum of \$5,000.00, making a total of \$10,000.00; and that these transfers constituted preferences under Sec. 60a of the Bankruptcy Act. It is also alleged in the answer that at the time of the transfers the bankrupt was either solvent, or as a result thereof, would be rendered insolvent. It was further alleged that the said Dr. Lands knew at the time of these transfers the financial condition of the bankrupt, and that the transfers were fraudulent as against the creditors of the bankrupt estate. On August 3,

1953, the Trustee filed his petition for an order directing the said Dr. Lands to return the said sum of \$10,000.00 to the bankrupt estate either as voidable preferences under Sec. 60a of the Bankruptcy Act or as fraudulent transfers under Sec. 67d of the Act. On September 11, 1953, the trustee filed an amendment to his said answer, wherein he set forth that the withdrawal of said sum of \$10,000.00 by Dr. Lands was without the authority of the board of directors of the bankrupt corporation and in violation of Secs. 824, 825, and 826 of the California Corporations Code. Dr. Lands filed his answer to the said trustee's petition, in which, in effect, he denies that the said transfers of the said sum of \$10,000.00 to him were either preferential or fraudulent.

These petitions and answers were consolidated, and a hearing was had before the Referee on September 11, 1953. [61] The reporter's transcript of that hearing was filed October 8, 1953.

These controversies were tried before the Referee by consent of the parties, and submitted to him for decision upon briefs, all of which have been filed.

II.

Statement of the Evidence

The bankrupt corporation was engaged in the commission brokerage and merchandising business at San Diego. It grew, harvested and sold peas, tomatoes and other crops, grown both in Mexico and in Southern California. Dr. Lands was an officer, viz., Secretary-Treasurer, but never did know much

of anything about its financial affairs. His duties as Secretary-Treasurer were merely nominal. The corporation's business was managed and operated by Wallace Springstead, its President. Dr. Lands held 40% of the capital stock of the corporation, Wallace Springstead 40%, and a Sidney H. Elzer the balance of 20%. These three persons were the directors of the corporation.

On or about October 3, 1952, the bankrupt was in need of fresh money to carry on its operations. Dr. Lands agreed to loan \$20,000.00 to the corporation, if he were given security for the loan. Thereupon, pursuant to a resolution of the Board of Directors, a written agreement was entered into and signed by the three directors of the bankrupt corporation, wherein and whereby Dr. Lands agreed to loan the corporation \$20,000.00, the same to be deposited in a special bank account to be opened by Dr. Lands in his own name only, all proceeds from the sale of crops to be deposited therein, he only to have the right to draw checks on said account, and he to have the right to draw out of said special account the \$20,000.00 due him out of the first \$20,000.00 received or derived from the [62] crops. This agreement was never recorded. Nor did any creditors of the bankrupt know about it, except the three directors. Such special bank account was opened and Dr. Lands deposited \$20,000.00 therein. But, instead of drawing out the first \$20,000.00 received from the proceeds of crops to repay his loan, Dr. Lands, upon

the request and insistence of the said Wallace Springstead, paid money out of said special account to pay current bills of the corporation, until December 2, 1952. On that date, Dr. Lands paid himself out of such account \$5,000.00 in partial payment of such loan. On December 2, 1952, before such withdrawal, the balance in such special account was \$8,520.00. At the end of that day, by reason of other withdrawals, the balance left in said special account was \$520.20. On December 12, 1952, the balance of said special account was \$3,211.83, having been built up by deposits to that amount from the \$520.20 left on December 2, 1952. The following deposits were made (1952): December 3, \$652.70; December 5, \$2880.00; December 8, \$6020.00; December 9, \$2382.02; December 10, \$972.02; December 12, \$5,000.00. On December 12, 1952, Dr. Lands paid himself out of the said special account \$5,000.00 to apply on the loan. He thus paid himself back \$10,000.00 on his loan of \$20,000.00.

The corporation was insolvent on and after December 2, 1952. The corporation maintained a separate bank account of its own at all times. No crop mortgage on said crops was given to Dr. Lands, nor was any account receivable from the sale of said crops ever formally assigned to him as security for said loan.

On August 13, 1953, the receiver filed herein his report and account showing that on February 10, 1953, he received into the estate \$10,978.94 as an account receivable from Yeckes-Echenbaum of New

York City, New York, for the sale [63] to them of certain carloads of peas.

III.

Questions Presented

1. Did the Referee have jurisdiction to try alleged voidable preferences or fraudulent transfers?

2. Has Dr. Lands an equitable lien upon the \$10,978.94 so paid to the receiver in bankruptcy?

3. Did Dr. Lands hold an equitable assignment of the accounts receivable arising out of the sale of crops?

4. Were the said two payments of \$5,000.00 each to Dr. Lands either voidable preferences under Sec. 60a, or fraudulent transfers under Sec. 67d, of the Bankruptcy Act?

5. Did Dr. Lands forfeit any security he had through such agreement with the corporation by not repaying himself the \$20,000.00 out of the first moneys that went into such special fund?

6. Was the payment of said sum of \$10,000.00 in violation of Secs. 824, 825 and 826 of the Corporations Code of California?

IV.

Comment on the Law

1. Jurisdiction.

Referees in Bankruptcy do not ordinarily have jurisdiction to try controversies involving voidable

preferences or fraudulent transfers. However, such jurisdiction can be conferred by consent, as was given here. *MacDonald v. Plymouth County*, 20 ABR. NS. 1, 286 U.S. 263, 52 S. Ct., 505, 75 L. Ed. 1093; *Page v. Arkansas*, 20 ABR. NS. 6, 286 U.S. 269, 52 S. Ct., 507, 76 L. Ed. 1096; in *re Rourke*, ED. Ky., 40 ABR. NS. 428, 28 F. S. 515. B.A., Sec. 2a(7) now requires that objection to jurisdiction must be presented at the outset and cannot any more be presented at any time before the [64] Referee makes his decision, as was previously held in the case of *Cline v. Kaplan*, 323 U.S. 97, 57, ABR. NS. 195, 65 S. Ct. 155, 89 L. Ed. aff'g CCA 7, 56 ABR. NS. 103, 142 F. (2) 301. Of course, trustees may oppose the allowance of claims filed upon the ground that the creditors were the recipients of voidable preferences or fraudulent transfers. B. A. Sec. 57g. And the findings of the Referee thereon, when they become final, are *res judicata*. *Breit v. Moore*, CCA 9, 34 ABR. 295, 220 F. 9. Whether a Referee may go beyond the mere disallowance of a claim on the ground and render a summary judgment against the claimant for any excess has not yet been definitely settled in the Ninth Circuit, or by the Supreme Court. The trend of recent decisions is that Referees have such power. In *re Mercury Engineering*, SD. Cal., 60 F. S. 786; *Columbia v. Lochner*, CCA 4, 179 F. (2) 630. In the case of in *re Nathan*, SD. Cal., 98 F. S. 686, the court held in effect that a creditor by presenting for examination and allowance his claim against a bankrupt estate impliedly consents to adjudication by the bankruptcy court

in summary proceedings, of not only the merits of the claim and of any defenses or set-offs thereto, but also the merits of any counterclaim for affirmative judgment which the trustee may properly assert in response to the claim, and such filing of the claim gives the consent necessary to confer jurisdiction on the bankruptcy court to adjudicate counterclaims for preferences, fraudulent transfers, etc. See, also, Fed. Rules Civ. Proc. 13(2), 41a(2); Gen. Or. 37; in re Petroleum Conversion, DC. Del. 99 F. S. 899.

2. In General.

A trustee may seek recovery of property in one suit on the grounds of both voidable preference and a fraudulent transfer, and the statement of claim alleging such grounds is not subject to attack on the basis of multifariousness or [65] in consistency, at least in the federal courts. *Kraver v. Abrahams*, ED. Pa., 29 ABR. 365, 203 F. 782; Fed. R. Civ. Proc. No. 8 (e)2.

If a person lending money to a corporation and taking security therefor is an officer of the corporation, this does not of itself invalidate the transaction, but merely requires that the evidence be subjected to close scrutiny as to the good faith of the officer; and such a transaction is valid if fairly entered into. *Federal Mining & Engineering v. Pollak*, (Nev.), 85 P. (2) 1008; *Arnold v. Phillips*, CCA 4, 117 F. (2) 497. One who is a director of a corporation acts in a fiduciary capacity. *Bainbridge v. Stoner*, 16 C. (2) 423, 106 P. (2) 423. There is no

question but that the transaction here was entered into and carried out in good faith. The corporation received the benefit of the money loaned to it by Dr. Lands.

3. Dr. Lands Did Not Have an Equitable Lien Upon the Proceeds of the Crops Before They Were Deposited in His Special Account.

It is contended by counsel for Dr. Lands that he had an equitable lien upon the proceeds of the sale of all crops after the said agreement of October 3, 1952, was entered into. Equitable liens are recognized in California as between the parties. *Mannon v. Pesula*, 59 V.A. (2) 597, 139 F. (2) 336; *Wagner v. Sariotti*, 56 C. A. (2) 693, 133 P. (2) 430; in re *Henshaw Estate*, 68 C. A. (2) 627, 157 P. (2) 390; *Washington Lumber & Millwork v. Maguire*, 213 C. 13, 1 P. (2) 437. But when bankruptcy comes, a different situation arises. Sec. 70c of the Bankruptcy Act provides that, as of the date of bankruptcy, the trustee in bankruptcy has all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings upon the property of the bankrupt. The [66] money paid to the Receiver was the proceeds of an unassigned account receivable of the bankruptcy as of that time. In the case of *Stepp v. McAdams*, CCA 9, 88 F. (2) 925, it was held that equitable liens will not be enforced against creditors without notice either actual or constructive, since the law frowns upon secret charges against property; and the rule in California accords with this general law. See, also, *Nat'l Bank v. Moore*, CCA 9, 41

ABR. 409, 247 F. 913; and by way of analogy, *Hayes v. Gibson*, CCA 9, 48 ABR. 570, 279 F. 812, aff'g in re *New York & Baltimore*, DC. Del., 47 ABR. 435, 276 F. 145. In the case of *Corn Exchange v. Klauder*, 318 U.S. 434, 63 S. Ct. 679, 87 L. Ed. 884, 52 ABR. NS. 596, aff'g in re *Quaker City*, CCA 3, 50 ABR. NS. 345, 129 F. (2) 895, it was held that the Bankruptcy Act, and particularly Sec. 70c thereof, contemplates the striking down of secret liens, such as unrecorded equitable liens. See, also, *Jud Whitehead Heater v. Obler*, 111 C. A. (2) 861, 245 P. (2) 608; *Menick v. Carson*, SD. Cal., 96 F. S. 817. There has been no showing here that any of the creditors of the bankrupt knew, or has cause to know, of the agreement between Dr. Lands and the bankrupt corporation, except the three directors of the corporation. By virtue of B. A. Sec. 70c, the trustee occupies the status of an ideal creditor without notice, armed with every right and power which State law gives its most favored creditor who has acquired a lien by legal or equitable proceedings.

In re *Waynesboro Motor*, 21 ABR. NS 449, 60 F. (2) 668; in re *Baungartner*, CCA 7, 20 ABR. NS., 153, 55 F. (2) 1041; in re *Allee*, CCA. 7, 19 ABR. NS. 584, 55 F. (2) 76. The Trustee can enforce the rights of any creditor without notice for the benefit of all creditors of the estate, even if some of them did have notice. *Moore v. Bay*, 18 ABR. NS. 675, 284 U.S. 4, 52 S. Ct. 3, 76 L. Ed. 133. Even if Dr. Lands held a formal assignment of the account receivable from *Yerkes-Echenbaum Co.*, which he did not, he still would have had to comply with Secs. 3017-3029 of the California Civil Code relating to the filing of notice of such assignments with county

recorders to protect himself against the rights of the Trustee. *Menick v. Carson*, SD. Cal., 96 F. S. 817.

So we are forced to conclude that Dr. Lands has no valid claim upon the said sum of \$10,879.94 in the estate as against the title thereto of the Trustee, upon any equitable lien theory.

4. The Agreement of October 2, 1952, Did Not Create in Favor of Dr. Lands an Equitable Assignment of the Accounts Receivable Arising Out of the Sale of the Crops.

To constitute an equitable assignment, the intent to do so and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. To do so is fatal to the claim. There must be a transfer of such a character that the fund holder can safely pay, and is compelled to do so, even though he be forbidden by the assignor. *East Side Packing v. Fahy Market*, CCA 2, 24 F. (2) 644. To constitute a valid equitable assignment, the words used must clearly create irrevocable appropriation of such funds. *Lowe v. Columbia Nat'l Life*, WD. Pa., 2 F. S. 99. No particular form is necessary to constitute an effective equitable assignment. *Gomes v. Warn*, 33 C. A. (2) 313, 91 P. (2) 214; *Van Order v. Golden West Credit*, 122 C. A. 132, 9 P. (2) 572; *Los Angeles City School District v. Tucker*, 99 C. A. 390, 278 P. 507. A promise to pay a debt out of a particular fund is not binding upon the promisor, and therefore, does not create an equitable lien. *Kup-*

penheimer v. Mornin, CCA 8, 78 F. (2) 261. An equitable assignment requires that there should be a complete and present right to the fund conferred on the assignee, not depending upon any future acts of the assignor to make it effective. *Duncan v. Guillet*, 62 Colo., 220, 161 P. 299; *Day v. Charlton*, 61 Okla. 130, 160 P. 606. An equitable assignment exists and a lien thereby is created upon a fund where there has been an actual appropriation thereof, either by the giving of an order to the holder of the fund or by some action whereby [68] such holder is authorized to pay the amount direct to the creditor without the further intervention of the debtor. *In re Goodman-Kinstler*, SD. Cal., 32 ABR. 624.

But the agreement of October 2, 1952, fails to meet these tests, at least as to the requirement that the assignor should not retain any authority over the fund, or the power to collect it. Here the bankrupt corporation collected the funds deposited in the special account; and, until so deposited, might have appropriated such funds to its own use. There was not any direction to any purchaser of the crops to pay direct to Dr. Lands. If the bankrupt corporation did appropriate to its own use the money collected from accounts receivable, the only remedy Dr. Lands would have had against the corporation would have been a suit for damages. *Duncan v. Guillet*, 62 Colo., 220, 161 P. 299; *Day v. Charlton*, 61 Okla., 130, 160 P. 606.

5. Were the Said Two Payments of \$5,000.00 Each to Dr. Lands, Either a Voidable Preference Under Sec. 60a of the Bankruptcy Act, or a Fraudulent Transfer Under Sec. 67d or 70e of the Act?

This is the most difficult problem we have to solve here. No evidence was presented at the hearing to show that Dr. Lands had reasonable cause to believe that the bankrupt was insolvent at the dates of the two payments. Of course, there is the presumption that the board of directors of a corporation know the financial condition of the corporation which it is their duty to manage and control. *Van Denburgh v. Tungsten Beef*, 20 C. A. (2) 463, 67 P. (2) 360; *First Nat'l v. Five-O-Drilling*, 209 C. 569, 289 P. 844. In the case of *Pacific Vinegar Works v. Smith*, 152 C. 507, 93 P. 85, the court goes even further and declares flatly that the officers and directors of a corporation are chargeable with knowledge [69] of the facts which its books of account and records disclose. Counsel for Dr. Lands cited the case of *Gleason v. Bush*, 166 NYS 321, 100 Misc. Rep. 608, an authority for the principle that the mere fact that a person is a director or stockholder of a corporation does not make him chargeable with actual knowledge of its business transactions, or of entries in its books. But here, in matters of this kind, we are bound by California law. *Laugharn v. Bank of America*. CCA 9, 88 F. (2) 551, 33 ABR. NS. 656.

It is, also, true that a director of an insolvent corporation cannot receive to himself any preference

or advantage over the other creditors in payment of his debt. *Bonney v. Tilley*, 109 C. 346, 42 P. 439; *Nixon v. Goodwin*, 3 C. A. 358, 85 P. 169. And this is irrespective of whether or not the director had knowledge, or reasonable cause to believe, that his corporation was insolvent. And the Trustee has under B. A. Sec. 70e, all the rights, remedies and powers of a creditor under State law with reference to fraudulent transfers.

It seems clear that Dr. Lands held a lien upon the money in his special bank account to the extent of the amount due him upon his loan, but the question arises what is the status of money paid into that account when the corporation was insolvent. Trustee's counsel contends that this special bank account did not give Dr. Lands a lien because he did not have possession of the money deposited in the bank; the relation between the bank and Dr. Lands being that only of debtor and creditor. *Gonsalves v. Bank of America*, 16 C. A. (2) 169, 105 P. (2) 118. But no one could draw upon this special account except Dr. Lands and he held sole possession of the chose in action of his right to withdraw the money from the bank. In this way, the situation is analogous to that of the creation of a pledge; and valid pledges create valid liens under the [70] California law. Cal. Civ. Code, Secs. 2987, 2988. We see nothing invalid in that sort of pledge created here. The evidence offered and received indicates insolvency only from December 2, 1952, on. On December 5, 1952, the balance in the special account was \$8,500.00; and on that date Dr. Lands withdrew \$5,000.00 from the

account to apply on his loan. No evidence was offered to show that this balance arose by reason of payments into the account when the bankrupt was insolvent. After such withdrawal of December 2, 1952, and the cashing of other checks, there was left in the special account \$520.20. The following deposits were thereafter made (1952): December 3, \$652.70; December 5, \$2880.00; December 8, \$6,020.00; December 9, \$2382.02; December 10, \$972.02; December 12, \$5,000.00. When Dr. Lands withdrew the \$5,000.00 on December 12, and after other checks were cashed, there was left \$11.83 in the special account.

So it seems fair to conclude that the second payment of \$5,000.00 to Dr. Lands came out of funds deposited in the special account while the corporation was insolvent. Therefore, under the principles of *Bonney v. Tilley*, *supra*, and *Nixon v. Goodwin*, *supra*, the second withdrawal of \$5,000.00, at least to the extent of \$4479.80 thereof, since \$520.20 was left on deposit as of December 2, 1952, was illegal and amounted to a fraudulent transfer which the Trustee has the right to set aside and recover under B. A. Sec. 70e.

6. Dr. Lands Did Not Forfeit Any Security He Had Under the Agreement and the Special Bank Account Because He Did Not Pay Himself the First \$20,000.00 Deposited Therein.

While the agreement provides that Dr. Lands shall reimburse himself out of the first \$20,000.00 de-

posited in the special account, this agreement was modified by an executed oral agreement under which Dr. Lands permitted the corporation to use a large portion of the money for business operation [71] purposes. Cal. Civ. Code, Sec. 1698. Here was done, with the consent of both parties, something that was not required to be done under the agreement, *Platt v. Butcher*, 112 C. 634, 44 P. 1060. The oral agreement here was fully performed (*Klein Norton v. Cohen*, 107 C. A. 325, 290 P. 613), and the evidence as to such oral agreement, and its execution, is clear and convincing (*Columbia Casualty v. Lewis*, 14 C. A. (2) 64, 57 P. (2) 64, 57 P. (2) 1010. *Houghton v. Lawton*, 63 C. A. 218, 218 P. 475). So it is apparent that the said requirement of the agreement was waived by both parties without impairing the security nature of the special bank account.

7. Secs. 824, 825, and 826 of the California Civil Code Do Not Apply Here Since There Was No Distribution of Any Part of the Assets of the Bankrupt Corporation to Dr. Lands.

The mere statement of this proposition suggests this answer. See, by way of analogy, *Williams v. Levy*, CCA 9, 19 ABR. NS. 389, 54 F. (2) 18.

V.

Conclusion

We conclude, therefore, that Dr. Lands has no interest in the money paid to the Receiver, and that he must pay back to the Trustee \$4479.80 of the

money paid to himself out of the special bank account.

Counsel for the Trustee will, therefore, prepare, serve and file, pursuant to Gen. Rule No. 7 of this court, appropriate Findings of Fact, Conclusions of Law and Order.

Dated: October 29, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 30, 1953, Referee. [72]

In the District Court of the United States, Southern
District of California, Central Division

No. 3433

In the Matter of

UNIVERSAL PRODUCE COMPANY, a California
Corporation,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

This matter came on to be heard before the undersigned Referee in Bankruptcy on Sept. 11, 1953, upon the reclamation petition of Dr. Victor G. Lands, and the answer thereto filed by the Trustee in Bankruptcy, and upon the petition of the Trustee to recover a preference and/or a fraudulent conveyance and the answer thereto of Dr. Lands, and upon the amendment to the answer filed by the

Trustee herein with leave of the Court first obtained.

The Trustee herein appeared through his attorneys, Quittner and Stutman, Mr. William J. Tierman of counsel. Doctor Victor G. Lands appeared with his attorney, Vivian M. Feld.

Evidence was received and the matter having been submitted on briefs, all of which have been filed, the Referee makes the following Findings of Fact, Conclusions of Law and Order: [86]

Findings of Fact

I.

The bankrupt corporation was engaged in the commission brokerage and merchandising business at San Diego. It grew, harvested and sold peas, tomatoes and other crops grown both in Mexico and Southern California. Dr. Lands was an officer, to wit, secretary-treasurer, but never did know much, if anything, about its financial affairs. His duties as secretary-treasurer were merely nominal. The corporation's business was managed and operated by Wallace Springstead, its president. Dr. Lands held 40% of the capital stock of the corporation, Wallace Springstead, 40% and Sidney H. Elzer the balance of 20%. These three persons were the Directors of the corporation.

II.

On or about October 3, 1952, the bankrupt was in need of fresh money to carry on its operations. Dr. Lands agreed to loan \$20,000.00 to the corporation if he were given security for the loan. Thereupon,

IV.

Findings of Fact and Conclusions of Law

These are set forth in the Order entered herein on Dec. 22, 1953.

V.

Documents Accompanying This Certificate

1. Petition to reclaim Property, filed Mar. 9, 1953.
2. Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 3, 1953.
3. Answer to Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 11, 1953.
4. Interim Account and Report of Receiver, filed Aug. 13, 1953.
5. Answer to Petition to Reclaim Property, filed Aug. 17, 1953.
6. Amendment to Petition for Order to Show Cause re preference and fraudulent conversion, filed Sept. 11, 1953. [100]
7. Memorandum of Facts, Law, Points and Authorities, filed Sept. 21, 1953.
8. Brief of Trustee in Support of Preference and Fraudulent conveyance, filed Oct. 13, 1953.
9. Reply Brief of Victor G. Lands, filed Oct. 20, 1953.

10. Memorandum Opinion re status of Dr. Victor G. Lands, filed Oct. 30, 1953.

11. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Nov. 21, 1953.

12. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

13. Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

14. Petition filed Dec. 31, 1953, for a review of said order of Dec. 22, 1953.

Dated this 5th day of January, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed January 5, 1954. [101]

PETITIONER'S EXHIBIT No. 1

Agreement

This Agreement made and entered into this 3rd day of October, 1952, by and between Universal Produce Company, a corporation, having its principal place of business in the City of San Diego, County of San Diego, State of California, and Vic-

Conclusions of Law

I.

The Court has jurisdiction over the parties hereto and the Court has jurisdiction to try the issues raised by the petition of reclamation and the answer and the petition to recover a preference or a fraudulent transfer and the answer thereto.

II.

Dr. Lands is not entitled to recover anything upon his reclamation petition.

III.

No lien in favor of Dr. Lands was created upon the monies which were received by the Receiver from Yeckes-Eichenbaum of New York City, after the filing of the bankruptcy petition, equitable or otherwise, by reason of the provisions of Sec. 70c of the Bankruptcy Act.

IV.

Dr. Lands does not have a lien, equitable or otherwise, upon the said sum of \$4,479.80 received by him out of the said special account on Dec. 12, 1952; and such transfer was made to him as a general unsecured creditor of the bankrupt corporation on account of an antecedent due him arising out of such loan. [89]

V.

Since a director of an insolvent corporation who is also a creditor thereof, cannot receive any preference or advantage in the payment to himself of his

claim against the corporation over other general creditors of the corporation, irrespective of whether he had actual knowledge of the insolvent condition of the company, the payment of \$4,479.80 to him on Dec. 12, 1952, was void as a fraudulent transfer under California state law, and Sec. 70e of the Bankruptcy Act.

Order

It Is Hereby Ordered, Adjudged and Decreed pursuant to said Findings of Fact and Conclusions of Law, that

I.

The petition in reclamation of Dr. Lands be, and the same hereby is denied.

II.

Dr. Victor G. Lands is ordered to pay to the Trustee herein the sum of \$4,479.80, together with interest at the rate of 7% per annum until paid, and, upon his failure to do so, the Trustee may apply to this Court for such other and further orders as may be necessary to secure the payment of the said sum.

Dated: December 22, 1953.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy.

[Endorsed]: Filed December 22, 1953, [90]
Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER OF DECEMBER 22, 1953

To the Hon. Reuben G. Hunt, Referee in Bankruptcy:

Comes now your petitioner, Victor G. Lands, and respectfully represents as follows:

I.

On or about March 9, 1953, petitioner, Victor G. Lands, filed a Petition to Reclaim Property in the above-entitled matter, seeking to reclaim from the above-entitled estate the sum of \$10,000.00 in cash which the Receiver had obtained from a New York firm as partial payment for certain railroad cars of peas grown by the bankrupt and shipped to said firm; on or about August 17, 1953, the Trustee in Bankruptcy filed his answer to said Petition to Reclaim Property; on or about August 3, 1953, the Trustee in Bankruptcy filed a petition to recover from petitioner, Victor G. Lands, the sum of \$10,000.00 as a preference and/or fraudulent conveyance and thereafter petitioner duly filed his answer to the trustee's said petition.

II.

Both matters came on for hearing before the Hon. Reuben G. Hunt, Referee in Bankruptcy, on September 11, 1953, and evidence having been [91] given, introduced and heard in open court, both matters were duly submitted.

III.

On or about October 30, 1953, the Hon. Reuben G. Hunt filed a Memorandum Opinion Re Status of Dr. Victor G. Lands denying the said Petition in Reclamation and declaring that the sum of \$4479.80 should be paid to the said Trustee by petitioner. Thereafter, counsel for the Trustee presented proposed Findings of Fact, Conclusions of Law and Order to which counsel for petitioner filed specific objections and corrections. A hearing on said objections and corrections was had on December 1, 1953, and counsel for the Trustee was directed to prepare and submit to counsel for petitioner for her approval a second set of proposed findings, conclusions and order. Counsel for the Trustee did so. This second set of proposed findings, conclusions and order was disapproved by counsel for petitioner who again filed specific objections thereto.

IV.

On December 22, 1953, the Hon. Reuben G. Hunt prepared, signed, filed and had entered his own Findings of Fact, Conclusions of Law and Order; that said Order pursuant to said Memorandum Opinion denied petitioner's Petition in Reclamation and ordered petitioner to pay to the Trustee the sum of \$4479.80. A copy of said Order is attached hereto and marked Exhibit "A."

V.

The said Findings of Fact, Conclusions of Law and Order of the said Hon. Reuben G. Hunt are erroneous for the following reasons:

A. The said Findings of Fact fail to include findings warranted and required by the evidence and set forth in the said Memorandum Opinion, to wit:

(1) That the entire transaction involved herein was entered into and carried out in good faith by petitioner, Victor G. Lands.

(2) That no evidence was presented to show that Dr. Lands [92] had reasonable cause to believe that the bankrupt was insolvent at the dates of the two payments.

B. The statement in the Findings of Fact, Paragraph III, page 3, lines 22-23, that "Dr. Lands did not have a lien" is not a finding of fact but is a conclusion of law and is contrary to law.

C. The statement in the Findings of Fact, Paragraph IV, page 3, lines 27-28, that "The bankrupt corporation was insolvent on and after December 2, 1952," is not a finding of fact but is a conclusion of law; such a finding or conclusion is not supported by the evidence and is contrary to law.

D. The Conclusion of Law, Paragraph II, page 4, that "no lien in favor of Dr. Lands was created thing upon his reclamation petition" is not supported by the evidence and is contrary to law.

E. The Conclusion of Law, Paragraph III, page 4, that "on lien in favor of Dr. Lands was created upon the monies which were received by the Receiver from Yeckes-Eichenbaum of New York City, after the filing of the bankruptcy petition equitable

or otherwise by reason of Sec. 70e of the Bankruptcy Act” is contrary to law.

F. The Conclusion of Law, Paragraph IV, page 4, that “Dr. Lands does not have a lien, equitable or otherwise, upon the said sum of \$4479.80 received by him out of the said special account on Dec. 12, 1952; and such transfer was made to him as a general unsecured creditor of the bankrupt corporation on account of an antecedent debt due him arising out of such loan” is not supported by the evidence and is contrary to law.

G. The Conclusion of Law, Paragraph V, page 5, that “Since a director of an insolvent corporation who is also a creditor thereof, cannot receive any preference or advantage in the payment to himself of his claim against the corporation over other general creditors of the corporation, irrespective of whether he had actual knowledge of the insolvent condition of the company, the payment of \$4479.80 to him on Dec. 12, 1952, was void as a fraudulent transfer under California [93] state law, and Sec. 70e of the Bankruptcy Act” is not supported by the evidence and is contrary to law.

VI.

The said Order is erroneous in that Dr. Lands had a lien upon the monies received from the Receiver to the extent of \$10,000 from Yeckes-Eichenbaum after the bankruptcy proceedings were filed and by reason of said lien is entitled to recover from the trustee the sum of \$10,000 as prayed for in his Petition to Reclaim.

VII

The said Order is further erroneous in that the payment to Dr. Lands on December 12, 1952, of \$4479.80 was not a fraudulent transfer to him under California state law and Section 70e of the Bankruptcy Act and was not void.

VIII.

In connection with the within Petition for Review, your petitioner respectfully requests that the following documents be certified to the District Judge:

1. Petition of Victor G. Lands to Reclaim Property filed March 9, 1953.
2. Trustee's Answer to said Petition to Reclaim Property filed August 17, 1953.
3. Trustee's Petition for Order to Show Cause Re Preference and Fraudulent Conversion filed August 3, 1953.
4. Answer of Victor G. Lands to Trustee's Petition for Order to Show Cause Re Preference and Fraudulent Conversion.
5. Reporter's Transcript of the evidence presented at hearing on the above-described petitions on September 11, 1953, before the Hon. Reuben G. Hunt.
6. Opening brief and points and authorities filed by Victor G. Lands in support of his Petition in Reclamation.

7. Brief of the Trustee in answer thereto and in support of his said petition. [94]

8. Reply brief of Victor G. Lands.

9. Memorandum Opinion of Reuben G. Hunt re Status of Dr. Victor G. Lands, dated October 30, 1953.

10. Trustee's Proposed Findings of Fact, Conclusions of Law and Order.

11. Petitioner's objections and corrections to said proposed findings, conclusions and Order and Petitioner's proposed Findings of Fact, Conclusions of Law and Order.

12. Second set of trustee's Findings of Fact, Conclusions of Law and Order.

13. Petitioner's objections and corrections to trustee's proposed second set of Findings of Fact, Conclusions of Law and Order.

14. Findings of Fact, Conclusions of Law and Order, dated December 22, 1953.

15. The within Petition for Review of Referee's Order of December 22, 1953.

Wherefore, your petitioner prays that said order be reviewed by the Judge of the District Court; that said order be reversed; that petitioner's petition in reclamation be granted and the trustee be ordered to pay to petitioner the sum of \$10,000; that the trustee be denied any relief on his petition to establish a preference and/or a fraudulent conversion or

conveyance; that no order be made directing any payment by petitioner to the trustee and that the order directing the said payment by petitioner to the trustee of the sum of \$4,479.80 be reversed; for such other and further relief as to the court may seem proper.

/s/ VICTOR G. LANDS,
Petitioner.

/s/ VIVIAN M. FELD,
Attorney for Petitioner.

Dated: December 31, 1953.

Duly verified.

[Endorsed]: Filed December 31, 1953. [95]
Referee.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S
ORDER DENYING PETITION IN RECLA-
MATION AND VOIDING FRAUDULENT
TRANSFER

At the request of Reuben G. Hunt, a Referee in Bankruptcy of this Court, pursuant to Bankruptcy Rule 207a of this Court, the undersigned Referee in Bankruptcy presents to the Court his certificate on review of the order of the said Referee in Bankruptcy Hunt entered herein Dec. 22, 1953, denying the petition in reclamation of Dr. Victor G. Lands

and decreeing that he pay over to the bankrupt estate the sum of \$4,479.80 received by him as a fraudulent transfer.

VIVIAN M. FELD, and
TOBIAS G. KLINGER,

Attorneys for Victor G. Lands, Petitioner
on Review.

QUITTNER AND STUTMAN,

Attorneys for Kyle Z. Grainger, Jr., Trustee,
Respondent on Review. [99]

I.

Statement of the Case

This is covered up to the point where the Referee's Memorandum Opinion was filed on Oct. 30, 1953. This opinion accompanies this Certificate. Findings of Fact, Conclusions of Law and Order were signed and filed and entered herein on Dec. 22, 1953. Thereafter and on the 31st day of December, 1953, Dr. Victor G. Lands filed herein his petition for a review of the said order of Dec. 22, 1953.

II.

Questions Presented

These are also set forth in the Memorandum Opinion.

III.

Comment on the Evidence and the Law

This is also set forth in the Memorandum Opinion.

IV.

Findings of Fact and Conclusions of Law

These are set forth in the Order entered herein on Dec. 22, 1953.

V.

Documents Accompanying This Certificate

1. Petition to reclaim Property, filed Mar. 9, 1953.
2. Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 3, 1953.
3. Answer to Petition for Order to Show Cause re preference and fraudulent conversion, filed Aug. 11, 1953.
4. Interim Account and Report of Receiver, filed Aug. 13, 1953.
5. Answer to Petition to Reclaim Property, filed Aug. 17, 1953.
6. Amendment to Petition for Order to Show Cause re preference and fraudulent conversion, filed Sept. 11, 1953. [100]
7. Memorandum of Facts, Law, Points and Authorities, filed Sept. 21, 1953.
8. Brief of Trustee in Support of Preference and Fraudulent conveyance, filed Oct. 13, 1953.
9. Reply Brief of Victor G. Lands, filed Oct. 20, 1953.

10. Memorandum Opinion re status of Dr. Victor G. Lands, filed Oct. 30, 1953.

11. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Nov. 21, 1953.

12. Objections and Corrections to Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

13. Findings of Fact, Conclusions of Law and Order, filed Dec. 22, 1953.

14. Petition filed Dec. 31, 1953, for a review of said order of Dec. 22, 1953.

Dated this 5th day of January, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed January 5, 1954. [101]

PETITIONER'S EXHIBIT No. 1

Agreement

This Agreement made and entered into this 3rd day of October, 1952, by and between Universal Produce Company, a corporation, having its principal place of business in the City of San Diego, County of San Diego, State of California, and Vic-

tor G. Lands, of 416 North Bedford Drive, City of Beverly Hills, County of Los Angeles, State of California,

Witnesseth:

Whereas the said Universal Produce Company is a corporation organized under and by virtue of the laws of the State of California and is engaged in the produce business, and

Whereas the said Universal Produce Company is the owner of two crops to be harvested during the months of October, November and December in the year 1952, to wit: 80 acres of hillside tomatoes planted on land rented by the said Universal Produce Company from one Bert Culbert and located on Los Angeles Avenue in the Los Pasas area of the State of California and 250 acres, more or less, of peas planted on the Leon Vincente Ranch and the Lorenzo Escalante Ranch in San Quintin, Baja, Mexico, and

Whereas the said Universal Produce Company is in need of additional funds in the amount of \$20,000.00 to enable the bringing to harvest of the said hereinabove described crops, and

Whereas the said Universal Produce Company is desirous of obtaining the said additional \$20,000.00 from the said Victor G. Lands,

Now, Therefore, in consideration of the promises and mutual covenants herein contained, the parties hereto agree as follows:

1. All monies derived or acquired or coming in from or [102] obtained as a result of or because of said crops of tomatoes and peas shall be deposited in a special checking account to be opened for that purpose at the San Diego Main Branch of the Bank of America in San Diego, California, in the name of the said Victor G. Lands. All checks drawn upon said special checking account shall require the signature of the said Victor G. Lands and only the said Victor G. Lands shall be authorized to write checks upon said account.

2. The said Victor G. Lands agrees to advance to the said Universal Produce Company the sum of \$20,000.00, all of which shall be deposited in said special checking account.

3. The said Universal Produce Company in consideration of said advance of \$20,000.00 by the said Victor G. Lands hereby agrees as follows:

a. That the first \$20,000.00 received or derived or coming in from said crops shall be paid directly to the said Victor G. Lands as a return of the new \$20,000.00 advanced by him.

b. That after said initial payment of the said \$20,000.00 has been made, an additional sum of \$15,000.00 shall then be paid to the said Victor G. Lands out of the next \$25,000.00 that is derived or brought in from said crops, as a return to the said Victor G. Lands of his capital investment in the said Universal Produce Company.

In Witness Whereof, the parties hereto have set their hands and seal the day and year above written.

[Seal] UNIVERSAL PRODUCE
COMPANY, by

[Seal] /s/ WALLACE SPRINGSTEAD,
President;

[Seal] /s/ SIDNEY H. ELZER,
Vice-President;

[Seal] /s/ VICTOR G. LANDS,
Secretary-Treasurer.

[Seal] /s/ VICTOR G. LANDS,

[Endorsed]: Filed September 11, 1953, [103]
Referee.

[Title of District Court and Cause.]

MEMORANDUM

The petition of Dr. Victor G. Lands to review an order of the referee dated December 22, 1953, be and is hereby affirmed.

The trustee is directed to forthwith submit to me proposed order affirming said referee.

Dated: This 7th day of April, 1954.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed April 7, 1954. [105]

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR REVIEW
AND AFFIRMING ORDER OF REFEREE

The petition of Dr. Victor G. Lands to review an order of the Referee dated December 22, 1953, came on for hearing before the Honorable Ben Harrison, Judge of the United States District Court for the Southern District of California, on the 29th day of March, 1954; the petitioner appeared by Tobias G. Klinger and Vivian M. Feld and the Trustee appeared by Quittner and Stutman by George M. Treister; the matter was submitted to the Court upon the briefs of the parties and the record previously filed herein; the Court having considered the briefs and the entire record in the above-entitled matter, and being fully advised in the premises, now, therefore, it is

Ordered, that the petition of Dr. Victor G. Lands to review the order of the referee dated December 22, 1953, be and the same is hereby denied; and it is further

Ordered, that the order of the Referee dated December 22, 1953, be and the same is hereby affirmed.

Dated, this 20th day of April, 1954.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed April 20, 1954. [106]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Victor G. Lands, Petitioner for Review in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in this action on April 20, 1954, denying the petition for review of the said Victor G. Lands and affirming the order of the Referee of December 22, 1953.

/s/ VIVIAN M. FELD,
Attorney for Appellant.

[Endorsed]: Filed May 18, 1954. [109]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS UPON WHICH HE INTENDS TO RELY

Appellant, Victor G. Lands, states that the points on which he intends to rely on the appeal in this action are as follows:

1. That the court erred in failing to include in its Findings of Fact a finding that the entire transaction was entered into and carried out in good faith by Victor G. Lands and such a finding is supported by sufficient evidence.

2. That the court erred in failing to include in its Findings of Fact a finding that no evidence was presented to show that Dr. Lands had reasonable

cause to believe that the bankrupt was insolvent at the dates of the two payments and such a finding is supported by sufficient evidence.

3. That there is no evidence to support the finding and/or conclusion that "the bankrupt was insolvent on and after December 2, 1952."

4. That Dr. Lands has a lien on the monies which were received by the Receiver from Yeckes-Eichenbaum of New York City in the amount of \$10,000 still remaining due, owing and unpaid to him. [110] The conclusion of law to the contrary is erroneous and not supported by the law or evidence.

5. That the court erred in its conclusion of law that "Dr. Lands did not have a lien, equitable or otherwise, upon the said sum of \$4479.80 received by him out of the said special account on December 12, 1952; and such transfer was made to him as a general unsecured creditor of the bankrupt corporation on account of an antecedent debt due him arising out of such loan."

6. That the conclusion of law that "since a director of an insolvent corporation who is also a creditor thereof, cannot receive any preference or advantage in the payment to himself of a claim against the corporation over other general creditors of the corporation, irrespective of whether he had actual knowledge of the insolvent condition of the company, the payment of \$4479.80 to him on December 12, 1952, was void as a fraudulent transfer under California state law and Section 70e of the Bank-

ruptey Act" is erroneous and is not supported by the law or evidence.

7. That Dr. Lands was entitled to receive the said sum of \$4479.80 on December 12, 1952.

8. That Dr. Lands had a lien on said funds.

9. That the denial of the petition in reclamation and the order for refund by Dr. Lands of the sum of \$4479.80 are not supported by the law or the evidence.

Dated: May 18, 1954.

/s/ VIVIAN M. FELD,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 18, 1954. [111]

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 3433

Before the Honorable Reuben G. Hunt,
Referee in Bankruptcy.

In the Matter of:

UNIVERSAL PRODUCE COMPANY,

Bankrupt.

REPORTER'S TRANSCRIPT OF PROCEED-
INGS OF HEARING ON ORDER TO SHOW
CAUSE, TRUSTEE v. VICTOR G. LANDS

Appearances:

For the Trustee:

W. J. TIERNAN, ESQ.

For Respondent Victor G. Lands:

MISS VIVIAN M. FELD.

STUART P. FISCHER, ESQ.

For the Bankrupt:

Friday, September 11, 1953—10 A.M.

The Referee: Universal Produce, is that ready?

Mr. Tiernan: Yes, your Honor.

Miss Feld: Ready, your Honor.

The Referee: Proceed.

Miss Feld: Call Dr. Lands.

VICTOR G. LANDS

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Miss Feld:

Q. Will you state your name, please, Dr. Lands?

A. Victor G. Lands.

Mr. Tiernan: We got a check for \$10,978.94 from the New York firm of Yeckes-Eichenbaum, which was, as far as I know, an account receivable of the company.

The Referee: You got the check?

Mr. Tiernan: We did get the check. We have the money now.

Miss Feld: Do you have that check?

Mr. Tiernan: The check has been cashed and the money put into the regular trustee account.

The Referee: Is the money in the estate?

Mr. Tiernan: The money is in the estate.

Miss Feld: That ten thousand dollars? [2*]

Mr. Tiernan: Yes. It came in some time after the appointment and qualification of the Receiver. I

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Victor G. Lands.)

would say it would be in February of this year, some time around February of this year, but I am not sure.

Miss Feld: On that question of the demand on the Receiver to turn over the \$10,000, I think we can stipulate on that, don't you?

The Referee: The Receiver's account on file shows that on February 16, 1953, he received from Yeckes-Eichenbaum the sum of \$10,978.94.

Mr. Fischer: May I, for the purpose of the record, state that I am the attorney for the corporation? I am Stuart Fischer, and I individually represented Mr. Elzer, who is an officer and director of the corporation. I am not concerned in this proceeding at all except so far as the bankruptcy is concerned, nor an active participant in this proceeding. I am more or less of a spectator.

Miss Feld: Are you willing to stipulate that on October 20, 1952, Dr. Lands loaned Universal Produce the sum of \$20,000?

Mr. Tiernan: We will so stipulate for the record, and I would like also a stipulation that the Doctor was an officer and director of the company.

Miss Feld: So stipulated.

The Referee: How many shares did he hold in the company? [3]

Miss Feld: 40 per cent.

The Referee: Who holds the other 60 per cent?

The Witness: Mr. Springstead held 40 per cent, and Mr. Elzer held 20 per cent.

Q. (By Miss Feld): Dr. Lands, will you tell

(Testimony of Victor G. Lands.)
the Court the circumstances leading up to this loan of \$20,000 on October 20, 1952?

A. On or about October 3, 1952, the Universal Produce Company had two crops which were growing, one in Ventura County, a tomato crop, and one a pea crop in San Quintine, Baja California, Mexico. At that particular time Mr. Springstead found himself short of funds to harvest these particular crops, and it was imminent that some money be obtained to do so. This was a relatively large investment, and the returns expected from these particular crops were also relatively large. Having made some representations to distributors in the East, namely, Earl Longo, of Philadelphia, and Mr. Yeckes, of Yeckes-Eichenbaum, to obtain advance moneys for this crop, Mr. Springstead was unable to make any agreement, because of the exorbitant rates demanded by these distributors. Rather than see the crops fail, I proceeded to lend the corporation the necessary moneys to harvest these particular crops. At first Mr. Springstead thought he might need \$13,000 to do the job.

The Referee: What is the name of that man?

The Witness: Springstead. [4]

The Referee: What relation did he have to the corporation?

The Witness: He was the president and general manager. I borrowed such an amount, and I presented myself with such a check at San Diego. However, Mr. Springstead then declared that such an amount was inadequate to do the job, and that he

(Testimony of Victor G. Lands.)

needed something closer to \$20,000. I returned several days later with a check for \$20,000, and there was a meeting of the Board of Directors, and Mr. Springstead, Mr. Elzer, Miss Feld and myself were present; and at that particular time an agreement was made as to how the \$20,000 would be distributed and utilized. I attempted to obtain some security for the loan at that particular time, and, in particular, I asked for a crop mortgage, and this was negated by Mr. Springstead, when he stated that he would be unable to do business in Mexico with a crop mortgage hanging over the crop. At that particular time, therefore, in order to facilitate the loan, a substitute security setup was created around the proceeds from the two crops.

Mr. Tiernan: Just a minute. You are referring to an agreement that was made. I think the agreement should speak for itself.

The Witness: Yes.

The Referee: Is the agreement in writing?

Miss Feld: Yes, there is a written agreement, [5] which I will introduce.

The Referee: Why not introduce that?

Miss Feld: All right. We have a carbon of the agreement. Will you take a look at that, Mr. Tiernan?

The Referee: Between whom was this agreement?

The Witness: This agreement was made between Universal Produce Company and myself. This agreement was made in writing and was committed

(Testimony of Victor G. Lands.)

to the minutes, and a duplicate resolution was made for the main branch of the Bank of America, San Diego, for their records, in order for them to facilitate the utilization of the money.

Q. (By Miss Feld): Dr. Lands, I am going to show you a document. Is that the document that you just testified to? A. Yes.

Q. Do you recognize the persons on this document? A. Yes, I do.

Q. Was this document signed in your presence by the people whose names appear thereon?

A. Yes, they were. It was also signed in your presence.

Mr. Tiernan: It may go in. There is no objection. I don't object to the minutes going in, with the understanding that they may not be binding on the Trustee in Bankruptcy.

The Referee: Well, they are not binding on anybody [6] here. The minutes might be entirely wrong. But the minutes can be received in evidence?

Mr. Tiernan: Yes, your Honor; they can go in.

Q. (By Miss Feld): Doctor, I am going to show you a document entitled "Board of Directors' Minutes of Meeting of October 3, 1952," and ask you if you recognize these documents?

A. Yes. The signatures are the same as those on the agreement.

Miss Feld: May we offer these in evidence?

The Referee: Yes. They will be received in evidence as Exhibit 2.

Q. (By Miss Feld): I show you a third docu-

(Testimony of Victor G. Lands.)

ment entitled "Minutes of Meeting of Board of Directors of Universal Produce Company, a California corporation, held on October 4, 1952," and ask you if you recognize that document?

A. Yes, I do. This document was also executed by the same people.

Q. Do you know if a copy of this document was left with the Bank of America, San Diego Main Branch, in San Diego?

A. Yes, a copy was left with the San Diego Branch of the Bank of America.

Q. Is this the document you spoke of a few minutes ago, when you said a copy of the resolution was [7] left with the bank?

A. Yes.

Miss Feld: We offer this as Petitioner's Exhibit 3.

The Referee: All right.

Q. (By Miss Feld): Dr. Lands, after this document was executed and the agreement went into effect, will you tell us what procedures were taken to put this agreement into execution?

A. Yes. Some of the moneys which were deposited, of the \$20,000, which were deposited in the main branch of the Bank of America at San Diego, checks would be written on that particular special account by me to the Universal Produce Company, at the request of Mr. Springstead, depending upon his needs in running the business and harvesting the two particular crops that have been mentioned.

Q. After this agreement was executed, did you

(Testimony of Victor G. Lands.)

or the Universal Produce Company set up a special account at the San Diego Main Branch of the Bank of America?

A. Yes; according to the resolution, such an account was set up, so that actually there were two accounts at the Bank of America. One was a special account, and the other was the regular account that had never been changed, that the Universal Produce already had.

Q. From October 3rd on, where were the proceeds obtained from the San Quintine pea crop or the Oxnard tomato crop, where were they [8] deposited?

A. These proceeds were deposited to my special account.

Q. At this particular time in the operation of the business of Universal Produce was there any other money coming in from any other crop?

A. Little or nothing. Universal Produce Company operated a seasonal business, and the only moneys that could have possibly come in were moneys such as late railroad claims, or some such small items. In the entire period during which this particular agreement was in effect, I think some \$450 of railroad claims was deposited, and such moneys were immediately written over to the account of the Universal Produce as it was needed by Mr. Springstead.

The Referee: The money that came in, what bank account did that go into?

The Witness: Into the special account.

(Testimony of Victor G. Lands.)

The Referee: Into your special account?

The Witness: Yes.

The Referee: And then, as Mr. Springstead needed the money, you wrote the checks?

The Witness: Yes, sir, wrote the checks to Universal Produce Company.

Miss Feld: I think the resolution would clarify the situation. All moneys that came in would go into the special account, and the only ones the bank would honor, [9] checks to Universal Produce, would be a check written by the Doctor on the special account.

Q. (By Miss Feld): Dr. Lands, prior to this agreement of October 3rd and the time of its execution, had you ever written any checks on the corporation account? A. No.

Q. What was the situation, as far as the corporate business was concerned, prior to this time, and your relation thereto?

Mr. Tiernan: Excuse me. I don't want to trouble the record with objections, but I think the question is a little broad.

The Referee: I will let him answer. Go ahead.

Mr. Tiernan: I will withdraw the objection.

The Witness: The relationship that I had to the particular corporation originally was one of investment. And Mr. Elzer came into the corporation as a sustaining investor, in the sense that at the particular time he came in the corporation needed banking credit, and by setting up a special drafting account, he put up a \$20,000 savings account, which

(Testimony of Victor G. Lands.)

was held by the Bank of America as a guarantee against the drafting credit. The particular relationship of Mr. Elzer and myself was strictly advisory, for instance, when crises would occur from time to time in the corporation. Other than that Mr. Springstead ran the business. He was both general manager and the prime [10] motivator, and took the brunt of the responsibility.

The Referee: This special account, were you the only one that could draw checks on that?

The Witness: Yes, sir.

Q. (By Miss Feld): Now, Dr. Lands, after the account was set up, did certain moneys come in from the pea and tomato crops?

A. Yes, at a rapid rate.

Q. And out of those moneys were you ever repaid any of the \$20,000 which was loaned to the corporation?

A. Yes, sir.

Q. How much were you actually repaid?

A. \$10,000.

Q. If you recall, do you know the dates on which those payments were made?

A. Yes; December 1, 1952.

Q. What was the amount of the payment?

A. \$5,000. And another \$5,000 on December 12, 1952.

Q. And at the present time, under the agreement of October 3rd, is there anything due, still owing and unpaid out of the \$20,000 loaned by you to the corporation?

A. Yes.

Q. How much is still unpaid out of that \$20,000?

(Testimony of Victor G. Lands.)

A. \$10,000.

Q. You heard Mr. Tiernan state to the Court that [11] the records show that the Receiver received a check in February of \$10,978.94 on the payment of Yeckes-Eichenbaum. To your knowledge, was any other money due Universal Produce Company from Yeckes-Eichenbaum as a result of this pea crop?

A. No; there were no other moneys due to the Universal Produce Company.

Q. And from your knowledge of the corporate affairs, what did this check of ten thousand and some odd dollars represent to the Universal Produce Company?

A. It would represent the remainder of the moneys due the Universal Produce from Yeckes-Eichenbaum. Of course, I thought there was more money than that due. But the last I noticed there were \$22,000 due Universal Produce by Yeckes-Eichenbaum.

The Referee: This agreement here, Petitioner's Exhibit No. 1, provides, in Paragraph 3 (a), "that the first \$20,000 received or derived or coming in from such crops shall be paid directly to the said Victor G. Lands as a return of the new \$20,000 advanced by him."

Was this money from Yeckes-Eichenbaum obtained for crops?

The Witness: Yes.

Miss Feld: The crops were crops they sold for Universal Produce Company.

(Testimony of Victor G. Lands.)

The Referee: Was this through a broker?

The Witness: Through a distributor in New York. [12]

The Referee: Distributing the crops of Universal Produce?

The Witness: Yes, sir.

Miss Feld: I don't know. Mr. Springstead would know.

The Referee: Had you received, prior to bankruptcy, any money in this special account from the sale of crops?

The Witness: Yes, sir.

The Referee: Do you remember how much—\$10,000?

The Witness: There was much more than that. There was close to—I think we have exact figures, but perhaps some \$90,000. That sounds more like it. I am not sure, but that is close to the figure.

Miss Feld: We have copies of the bank statements that show exactly what it was.

Mr. Tiernan: Do you want to put those in?

Miss Feld: Well, if the rest of you would like to see them.

The Referee: Have you got the canceled checks?

Miss Feld: I have some of them. Most of them are in the San Diego office. Mr. Springstead would have them. We have the check books.

The Witness: Yes, the check stubs.

The Referee: Are you going to put in the special account, from the time it was opened, October 4th, up until January? [13]

(Testimony of Victor G. Lands.)

Miss Feld: Yes. These are copies kept by Mr. Barry, who is one of the assistant managers.

The Referee: That will be Petitioner's Exhibit 4.

Have you any supporting documents regarding these charges? You say you haven't the checks?

Miss Feld: I have some of the checks. I have the check books. I will look at the checks I have.

Mr. Tiernan: I have never seen the check books.

The Referee: That is the check book of the special account?

The Witness: Yes, sir.

Miss Feld: Yes. These are the deposit books for all that were sent up from San Diego, that is, those were deposit books for all that were mailed up to us.

The Referee: You say you have some canceled checks?

Miss Feld: I am checking right now to see. I think I do. I think we have all of them.

The Referee: All of the canceled checks?

Miss Feld: All that we have got.

The Referee: These check book stubs, are they in your handwriting?

The Witness: Yes, sir.

Q. (By Miss Feld): Dr. Lands, these deposits, were they made by yourself?

A. No. They were made either by—by the girl in the office, I guess.

Q. Do you have any recollection how you got hold [14] of those checks?

(Testimony of Victor G. Lands.)

A. They were mailed up to me from San Diego.

The Referee: This account in the Bank of America, was it in your name?

The Witness: Yes, sir.

The Referee: Not in the corporation's name?

The Witness: No.

The Referee: I think we will tear these stubs out, so that they won't encumber the record.

Miss Feld: We have no objection.

The Witness: Shall I pull these out?

The Referee: Don't spoil them.

Mr. Tiernan: I think we ought to have the canceled checks.

The Referee: Maybe the Receiver has some of them. I don't know. Let's put them all in together.

Miss Feld: I brought everything we had.

The Referee: This bank statement, I think it is a duplicate, isn't it?

Miss Feld: I think it probably is the original, but I have no way of knowing whether all the canceled checks are there or not.

The Referee: This statement, Petitioner's Exhibit 4 that you got from the bank, that covers the entire account, doesn't it?

Miss Feld: Yes, that's right. [15]

The Referee: Suppose I attach those together all as part of that one exhibit.

Mr. Tiernan: I think that would be fine.

Miss Feld: That is all right.

The Referee: All right. That will be part of Petitioner's Exhibit 4.

(Testimony of Victor G. Lands.)

Miss Feld: I think that is all.

Cross-Examination

By Mr. Tiernan:

Q. Dr. Lands, referring to the agreement of October 3rd, were you asked or did you volunteer to abstain from voting in connection with the resolution which approved the execution of this agreement by the company? A. No.

Q. Referring now to Paragraph 3 (b) here, which provides that after the payment of the original \$20,000, you would receive an additional \$15,000. Was that to be in the nature of a bonus or interest, or was it discussed at all?

A. Yes, it was discussed.

Q. Was it considered to be owing on your obligation, or a bonus, or—

The Referee: Just a minute. Just let him talk.

The Witness: When I made the original investment with Mr. Springstead, our association was in the form of a partnership, and at that particular time the investment [16] was \$15,000, and, because of the large—

The Referee: You put \$15,000 in with him?

The Witness: Yes. Originally that \$15,000 was to be returned within a very short period of time.

The Referee: Was this during the partnership?

The Witness: Yes. Because of the continued difficulties that the partnership sustained, such moneys were unable to be returned. With the crop

(Testimony of Victor G. Lands.)

that was planted in San Quintine, the representations made by Mr. Springstead were that the returns would be of such magnitude that they would more than take care of all the obligations of the corporation, and still have ample amounts left to take care of the original obligation or understanding that I would receive that original investment back.

Q. (By Mr. Tiernan): At this particular meeting in October was the financial condition of the company discussed? A. Yes.

Q. Wasn't it your feeling that the company had been operating for several months at a continuing loss? A. That I do not know.

Q. But you knew the company had no money?

A. Had no money to harvest the crop.

Q. They needed cash for operation?

A. That is right.

Q. You said at the time the company was only concerned, or, was only concerned with the tomato crop in [17] California and the pea crop in Mexico?

A. That's right.

Q. There were no other problems of the company at the time? A. That's right.

Q. As far as you know? A. That's right.

Q. You stated that you brought up the question of a crop mortgage, and Mr. Springstead turned that down; is that right? A. That is correct.

Q. Was the question of your getting an assignment of any accounts receivable ever discussed?

A. I wasn't interested in——

The Referee: Answer yes or no.

(Testimony of Victor G. Lands.)

The Witness: No.

Q. (By Mr. Tiernan): No discussion of any assignment? A. No, sir.

Q. With the exception of this agreement, which is in evidence, were there any documents signed between yourself and the company, promissory notes, or a mortgage, or an assignment of any kind?

A. No.

Q. This constitutes the entire agreement between the parties?

A. That and the minutes and the resolution [18] at the bank, yes.

Q. Do you recall having your deposition taken in my office? A. Yes, I do.

Q. That was in connection with the involuntary proceeding. I am reading you—

The Referee: Let him read it first.

Mr. Tiernan: Yes, your Honor.

The Referee: Refer to the page.

Mr. Tiernan: Page 18.

Mr. Fischer: I have an extra copy.

The Referee: This is a deposition taken in this bankruptcy proceeding on April 21, 1953, at Los Angeles.

Mr. Tiernan: Page 18.

The Referee: Before Louis Sommers, a Notary Public. Go ahead.

Q. (By Mr. Tiernan): Mr. Lands, will you read the questions beginning on line 9, and your answers, and tell me if those questions were asked by me, and if those were your answers at that time?

(Testimony of Victor G. Lands.)

The Referee: What page?

Mr. Tiernan: Page 18, beginning on line 9.

The Witness: Yes.

The Referee: Did you give those answers?

The Witness: Yes.

Q. (By Mr. Tiernan): Will you read them for the [19] record?

The Referee: There is no necessity for that.

Mr. Tiernan: I want to get them into the record.

The Referee: Well, but he testified exactly the same thing right here, that this bank account handled all the receipts. There is no variance between this and his testimony.

Mr. Tiernan: All right. Thank you.

The Referee: I mean the special bank account?

The Witness: Yes, sir.

The Referee: Go ahead.

Q. (By Mr. Tiernan): Doctor, you testified that the money which was deposited in this so-called special account in the bank at San Diego principally came from the proceeds of these pea and tomato crops? A. That is correct.

Q. Were you in charge of the deposits?

A. No.

Q. How did you know that the money came into the special account from the proceeds of the pea and tomato crops? How did you know that?

A. The only way I would know anything at any time, under any circumstances, in the handling of this particular business, was from information from Mr. Springstead.

(Testimony of Victor G. Lands.)

Miss Feld: The deposit slips in evidence [20] would show that.

The Witness: Yes, they do.

Miss Feld: The deposit slips show——

The Referee: He said he got the information from Mr. Springstead.

Mr. Tiernan: Yes, that's right.

Can I see Exhibit 4, your Honor? That is the big one, the bank account and the——

The Referee: All right. It is right here.

Q. (By Mr. Tiernan): Now, Doctor, there is a check in here somewhere for \$2,100, payable to Miss Feld, Miss Vivian Feld. That check is in addition to the two checks for \$5,000. Will you tell us what that was for? It is in here somewhere. It is a check dated December 17th, check No. 42, in the sum of \$2,100, payable to Cash, which is endorsed by Miss Feld. A. That's right.

The Referee: Wait a minute. Was this check drawn on your special account in the Bank of America that you testified about?

The Witness: That's right.

The Referee: Check No. 42?

The Witness: Yes.

The Referee: All right.

The Witness: This check was drawn on December 17, 1952. Prior to December 17th, and shortly after December [21] 12th, when I wrote a check for myself for \$5,000, the second check I had written for \$5,000, Mr. Springstead needed picking cash,

(Testimony of Victor G. Lands.)

cash for picking the crop down in San Quintine.

The Referee: He needed ready cash?

The Witness: Yes; and he needed it immediately, and I forwarded to the Universal Produce Company, by cashier's bank check, \$2,100, and this is in repayment of the \$2,100.

The Referee: She cashed the check and gave you the money?

The Witness: That's right.

Q. (By Mr. Tiernan): What did you do with the money? You bought a cashier's check?

A. No, no.

Q. I didn't understand.

A. I think I stated——

The Referee: I understand him to say that, needing some quick money for picking, he drew a cashier's check——

The Witness: I sent \$2,100 down out of my personal money.

The Referee: To take care of this emergency situation?

The Witness: That's right.

The Referee: And, to make up for that, you drew a check for \$2,100 on your special account, and Miss Feld cashed it for you and gave you the money?

The Witness: Yes, sir, that's right. [22]

Q. (By Mr. Tiernan): Why was it handled in that fashion? Wouldn't it be just as simple to draw the check payable to Universal?

A. At that particular time the draft that was

(Testimony of Victor G. Lands.)

due from the East had not yet arrived, so that there wasn't available cash in the bank account.

The Referee: You mean in the special bank account?

The Witness: Yes, sir.

The Referee: Apparently this check was cashed December 30, 1952. Is that right?

The Witness: December 17th.

The Referee: That is right. It just shows cash December 30, 1952, and, according to this bank statement, the day before there was \$2,276.71 on hand, and the cashing of this check left \$176.71 in this special account.

The Witness: That is correct.

Q. (By Mr. Tiernan): Doctor, you will note in the agreement, Paragraph 3 (a), that it says that the first \$20,000 received or derived or coming in from said crops shall be paid directly to yourself?

The Witness: Yes.

Q. Now, I direct your attention to the bank statement, which indicates that during the month of October and during the month of November considerable sums in excess of \$20,000 were deposited in this account; is that correct? [23]

A. That is correct.

Q. You did not withdraw the \$20,000 then, did you?

A. No.

Q. And this was—well, according to your testimony, substantially all of the deposits were the proceeds of this pea crop?

A. That is correct.

Q. You did not draw out the first \$20,000, did

(Testimony of Victor G. Lands.)

you, that came in? A. No, that is correct.

Q. Now, Dr. Lands, you testified before that you never wrote checks on the regular or corporate bank account? A. That's right.

Q. You had the authority to countersign checks?

A. I had authority to write checks.

The Referee: On other accounts?

The Witness: Yes, on other accounts.

The Referee: We are talking about having authority to write checks on some bank account different than the special account?

The Witness: Yes.

The Referee: Was there another bank account?

The Witness: Yes, there always was.

The Referee: In the corporate name?

The Witness: Yes.

Q. (By Mr. Tiernan): Now, Doctor, when you withdrew [24] the sum of \$5,000 on those two occasions, a total of \$10,000, was there a directors' meeting held by the corporate officers?

A. No.

Q. Did you receive the consent or approval of Mr. Elzer or Mr. Springstead to do that?

The Referee: Let the record show that on December 2, 1952, a check for \$5,000 was cashed out of the special account by Dr. Lands, and a similar check for \$5,000 likewise cashed December 12, 1952, out of such special account. Now, will you answer that question?

The Witness: Will you repeat the question, please?

(Testimony of Victor G. Lands.)

Q. (By Mr. Tiernan): Did you get the consent of Mr. Elzer and Mr. Springstead to withdraw this \$10,000? A. No.

Q. Was there a corporate meeting of the Board of Directors giving you consent to withdraw that money?

A. No. Such approval wasn't necessary.

Q. The answer is No?

A. The answer is No.

The Referee: No approval was needed for that?

The Witness: No.

Mr. Tiernan: That is all. [25]

Redirect Examination

By Miss Feld:

Q. Dr. Lands, after January 1, 1953, to your knowledge, did any more money come in from the proceeds of the peas? A. Yes.

Q. Was there another bank account opened?

A. Yes.

Q. Will you tell us the circumstances under which it was opened?

A. The directors of the Bank of America had about enough of the business of Universal Produce Company, and they requested kindly that we transfer our activities elsewhere, and, complying with that, and desiring to continue the business, Mr. Springstead and Mr. Elzer and I talked of opening a new account at the U. S. National Bank in San Diego.

Q. I show you a bank statement and certain

(Testimony of Victor G. Lands.)

canceled checks connected therewith, of the United States National Bank at San Diego, and ask you if this represents the first account you just mentioned?

The Referee: That doesn't affect this case any.

The Witness: This is the same account.

Miss Feld: It is a new special account, a continuance of the first one.

The Witness: A new special account.

The Referee: All right. We'll mark that Petitioner's Exhibit No. 5. [26]

The Witness: In other words, any other checks that would be received from Yeekes-Eichenbaum in payment of peas sent to them would be deposited in the United States National Bank.

The Referee: In the new special account?

The Witness: In the new special account, yes.

Q. (By Miss Feld): And was the arrangement with the bank the same type of arrangement that you had with the Bank of America?

A. That's right.

Q. And at any time did you consider yourself as having the right, Dr. Lands, to enforce collection of these debts?

The Referee: That is not proper.

Miss Feld: That is all.

Mr. Tiernan: No further questions.

Miss Feld: I think that is all.

The Referee: Any further witnesses?

Miss Feld: No, no further witnesses.

The Referee: Perhaps we had better take a recess. It is 11:00 o'clock now.

(Short recess.)

Mr. Fischer: Your Honor, I wonder if I could interrupt a minute?

The Referee: Go ahead.

Mr. Fischer: Does your Honor see any reason why I, [27] as attorney for the corporation, should remain present at these proceedings?

The Referee: You are not involved in this?

Mr. Fischer: I don't think so.

* * *

Mr. Tiernan: Your Honor, the case of the Trustee involves a preferential transfer under 60(a) or a fraudulent transfer under 67(d). In the alternative, I want to amend our petition to set forth an unlawful distribution by the Board of Directors, pursuant to Section 824, et seq., of the Corporation Code of the State of California. The facts are there, but it is a matter of legal conclusion. I will make a motion to amend the petition to set forth that the actions of Dr. Lands constituted an unlawful distribution pursuant to Section 824, et seq., of the Corporation Code.

The Referee: Suppose he had security.

Mr. Tiernan: That is for the interpretation of the Court.

The Referee: I don't want this thing delayed any longer. I will consider that. Suppose we reserve that until 2:00 o'clock.

Miss Feld: May I take a look at the papers?

The Referee: I think the amendment ought to be filed. Can you get it on file so that we can go ahead

at 1:00 o'clock? How much longer will it take? Let's say 2:00 o'clock. [28]

Mr. Tiernan: If this amendment will delay the proceeding, I would just as soon make the motion at the end.

The Referee: No. If you want to amend, do it now, and have it on file before 2:00 o'clock.

Mr. Tiernan: Very well. May we proceed?

The Referee: Go ahead.

Mr. Tiernan: Point No. 1: Your Honor, it has been stipulated in the court proceeding to the effect that the Doctor was an officer, director and shareholder of the corporation, and I assume we can have the same stipulation, that he made a loan to the corporation of \$20,000.

Miss Feld: Yes.

Mr. Tiernan: And I believe we can have the same stipulation, that he was repaid the sum of \$5,000 on each of the dates of December 1st and December 12th, respectively, as appears in the earlier proceedings.

Miss Feld: Yes.

Mr. Tiernan: I think the issues involve two points, the financial condition of the company and the knowledge of Dr. Lands. One of the assets of this estate consists of so-called freight claims for damaged produce shipped, which was in the hands of so-called claim agents. These are the claim agents Sherman & Strahan. At my request Mr. Strahan, of that company, prepared a letter, which was shown to Miss Feld, and it may be stipulated that this [29] letter may be received in lieu of the testi-

mony of the freight agent concerning the value of this particular asset.

The Referee: What has this got to do with it?

Mr. Tiernan: It may tend to show solvency or insolvency, which is in issue. Unless Miss Feld is willing to stipulate concerning the solvency or insolvency of the company we will have to go——

The Referee: Is that stipulated?

Miss Feld: Yes.

Mr. Tiernan: It is stipulated that it may go in?

Miss Feld: Yes.

The Referee: That will be Trustee's Exhibit A.

Mr. Tiernan: I will call Dr. Lands as an adverse witness for just a few preliminary questions.

VICTOR G. LANDS

having been heretofore duly sworn, upon being recalled as an adverse witness by the Trustee, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Dr. Lands, you verified in these proceedings an answer to the petition for order to show cause concerning preference and fraudulent conversion, did you not? A. Yes.

Q. Do you recall signing that answer?

A. Yes, sir.

Q. Do you recall that you denied that the company [30] was insolvent?

Miss Feld: As of what date, Mr. Tiernan?

(Testimony of Victor G. Lands.)

The Referee: The record speaks for itself. Whatever it contains is there.

Q. (By Mr. Tiernan): Let me put it to you this way: Did you ever see the original petition for the recovery of preference which was filed by the Trustee in this proceeding? Did you examine that or discuss it with your counsel? A. Yes.

Q. Then you knew that the Trustee alleged that on December 1st and December 12th, 1952, at the time you transferred the sum of \$10,000 to yourself, the Trustee alleges that the corporation was insolvent at that time? A. Yes, sir.

Q. And you denied that? A. That's right.

Q. Did you cause an examination to be made of the books and records of the company?

A. I wish you would state that more specifically.

Q. You denied that the corporation was insolvent, in your verified answer, and therefore you must have had some information concerning the financial condition of the corporation, and I want to know where you got it.

A. That's right. At that particular time, specifying December 1st and December 12th, the only [31] information I obtained was the information I received from Mr. Springstead, and at that time the supposed return from the crop was in the neighborhood of \$100,000, and, based on that return, I made the loan of \$20,000 originally, and based upon that return, I took what was coming to me under the terms of the agreement.

Q. You set forth in your answer that the com-

(Testimony of Victor G. Lands.)

pany was solvent, and you alleged that they were not insolvent?

A. To the best of my knowledge, on that particular date, the company was solvent.

Q. And your allegations or representations are based entirely upon your conversations with Mr. Springstead; is that correct?

A. That is correct.

Q. Did you ever cause, or did you ever request an accountant by the name of George Peterson, of La Jolla, California, to make an examination of the books and records of the company in your behalf?

A. Yes. After the——

Q. When was that?

A. It was made after the proceedings in bankruptcy had been made, after January 16th.

Q. Would that be some time in January of this year?

A. It was some time in February.

Q. What were your instructions to Mr. Peterson?

A. This particular request from Mr. Peterson was [32] made on behalf of Mr. Fischer, who is the attorney for the corporation.

Q. You never contacted him yourself? You never spoke to Mr. Peterson yourself?

A. Yes, I called Mr. Peterson and asked him to make an audit, if possible.

Q. On behalf of whom?

A. On behalf of Mr. Fischer.

Q. Was that audit made to your knowledge?

(Testimony of Victor G. Lands.)

A. I talked to Mr. Peterson last night and I am explaining——

Q. Go ahead. Was an audit made?

The Witness: I would like to ask you——

The Referee: What is the question?

The Witness: I would like to have the question.

(The question was read by the reporter.)

The Referee: Answer yes or no. Do you know whether an audit was made?

The Witness: No, I don't know. I wasn't there.

Q. (By Mr. Tiernan): Did you ever communicate with Mr. Peterson and direct him not to furnish certain information to the Trustee in this case, or to his representatives? A. Yes.

Q. When was that communication made with Mr. Peterson? A. In the last few days. [33]

Q. Was Mr. Peterson engaged by yourself as a Certified Public Accountant?

A. What are you referring to now?

Q. Mr. Peterson has refused to give to the Trustee and his representatives information concerning the audit that was made of the books of this company in January of this year, on the basis that he was instructed to, by yourself?

A. That is correct.

The Referee: Did you instruct him not to give this information?

The Witness: The information was obtained by Yates early in the year.

Q. (By Mr. Tiernan): But you instructed him not to furnish certain information to the Trustee?

(Testimony of Victor G. Lands.)

A. Yes.

Mr. Tiernan: No further questions at this time.

Cross-Examination

By Miss Feld:

Q. Dr. Lands, were those instructions given to Mr. Peterson on advice of counsel? A. Yes.

Miss Feld: That is all.

Mr. Tiernan: I would like to call Mr. Elzer.

The Referee: Before you examine Mr. Elzer, I would like to have Dr. Lands come back. [34]

This agreement, Exhibit 1, that we have been talking about, recites as follows:

Paragraph 3(a): "That the first \$20,000 received or derived or coming in from said crops shall be paid directly to the said Victor G. Lands as a return of the new \$20,000 advanced by him."

Did you take any of that first \$20,000?

The Witness: No, sir.

The Referee: Did you apply any of that on the loan you made?

The Witness: No, sir.

The Referee: All right.

Mr. Tiernan: Call Mr. Elzer.

SIDNEY H. ELZER

called as a witness in behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Mr. Elzer, do you recall having your deposition taken in my office in connection with the bankruptcy proceedings? A. Yes.

Q. And Miss Feld was there, too? A. Yes.

The Referee: Examine him first, before you try to impeach him. [35]

Mr. Tiernan: I am just trying to refresh his recollection.

The Referee: Ask him your questions, and if he doesn't know, you can refresh his recollection.

Q. (By Mr. Tiernan): Mr. Elzer, do you remember the time we asked you a number of questions and you answered——

The Referee: That is not proper.

Q. (By Mr. Tiernan): You were questioned concerning the financial condition of the company?

The Referee: That is not proper either. If you want to find out what he knows about the financial condition, you can ask him, and if he testifies contrary to his deposition, you can produce it.

Q. (By Mr. Tiernan): Mr. Elzer, were the assets and liabilities of Universal Produce Company the same or approximately the same on January 16th, when the involuntary petition in bankruptcy was filed, as in the period of December 1, 1952, to December 12, 1952?

(Testimony of Sidney H. Elzer.)

The Referee: How would he know?

The Witness: I have no way of knowing exactly, but, as far as I know, they were substantially the same, as far as I know.

Mr. Tiernan: All right.

The Referee: You have no personal knowledge?

The Witness: No; I didn't see the books.

Q. (By Mr. Tiernan): Now, did you not stipulate with [36] myself, as representative of the petitioning creditors, through your counsel, Mr. Fischer, that the corporation was insolvent on January 16th, when the involuntary petition was filed?

A. To my knowledge, it was based on this fact. I had put up my personal bank account of \$20,000 for drafting credit, and some checks—previous to this the bank notified me that they were withdrawing \$9,000 from my account, to apply on some drafts the Universal Produce couldn't pay. And it was a question of whether these things were going to make enough to pay everything they owed, including myself, and including Dr. Lands, and I couldn't tell, and nobody else could.

Q. How much is the corporation indebted to you?

A. Well, actually \$9,000 there, and approximately four to five thousand for one other deal which was not reflected on the books, for another deal which the corporation had gone into, which does not reflect on the books.

Q. What would be the sum total of the obligations to you?

(Testimony of Sidney H. Elzer.)

A. Well, personally, I would say \$13,500 or \$14,000. The whole question was whether the corporation could, in fact, pay it, and if it could, they were solvent, and if it couldn't they were insolvent, and on January 16th I was led to understand that they would not be. [37]

Mr. Tiernan: That is all for Mr. Elzer.

The Referee: Any cross-examination?

Cross-Examination

By Miss Feld:

Q. Mr. Elzer, on December 1, 1952, to the best of your knowledge, was the company still shipping peas? A. Yes, sir.

Q. Now, on December 12th, were they still shipping peas?

A. Yes, to the best of my knowledge.

Q. What, to the best of your knowledge, was the expectation from the returns on the peas at that time?

A. Well, if they were to ship what we were told was in the crop, everybody would be paid.

Q. And that was the status as of the 1st and 12th of December, 1952; is that correct?

A. As far as I know, yes. I never saw the crops. I never knew how they were, except what I was told.

Q. Mr. Elzer, a few minutes ago, in answer to a question put to you as to whether the assets and liabilities of the corporation were the same on De-

(Testimony of Sidney H. Elzer.)

ember 1st and 12th, 1952, as they were on January 16, 1953, I believe you answered yes?

A. As nearly as I could know offhand. I never looked at the books, but, as of January 16th, when they went into involuntary bankruptcy, we weren't shipping. [38] They didn't pay me off, but they paid off Dr. Lands, and didn't pay off many of the bills.

The Referee: Did you know what assets they had in December?

The Witness: Not exactly, no, sir, but I knew roughly the potential crop.

The Referee: Any accounts receivable?

The Witness: Yes, there was.

The Referee: Do you know how much they were worth?

The Witness: No.

The Referee: Do you know how much the crop was worth?

The Witness: No.

The Referee: Did you know how much the accounts receivable were worth?

The Witness: No.

The Referee: Did you know what the liabilities were?

The Witness: Yes, approximately. We had gone into what the company owed and into their potential crops.

The Referee: What did you know about the total liabilities?

(Testimony of Sidney H. Elzer.)

The Witness: Well, as an estimate, \$80,000 to \$90,000 or \$100,000.

Q. (By Miss Feld): Mr. Elzer, did you know that as of December 12th the expectation from the crop, there was still an expectation of at least \$51,000 coming in from [39] the pea crop?

A. I can't say \$50,000, but we were supposed to be able to ship a lot of peas, if they didn't freeze.

Q. As of December 12th? A. Yes.

Q. Mr. Elzer, what was your status in the corporation, as far as controlling its affairs or management was concerned? A. None whatever.

Q. Did you spend any time in San Diego?

A. Yes. I made several trips with Dr. Lands.

Q. Is it true that those trips were made after your agreement of October 3, 1952?

A. I don't know how many were made, but some before and some after.

Q. Did you ever examine the books of the corporation?

The Referee: He said he never saw the books.

The Witness: No, I didn't see the books at that particular time.

The Referee: Did you ever see them?

The Witness: Yes, I saw them some time—I have seen them, but they were never up to date. I looked at them as close as I could; every time I would go down I would look at them, but they were never up to date.

The Referee: Were you ever able to get a com-

(Testimony of Sidney H. Elzer.)

plete [40] idea of the financial setup of the corporation from looking at the books?

A. Never a complete examination.

The Referee: Were you able to get an idea of the financial condition of the corporation from the books?

The Witness: Approximately—you can get an approximate picture, but never the complete picture.

The Referee: Do you remember that on Thursday, April 23, 1953, your deposition was taken in Mr. Tiernan's office on Spring Street down here?

Mr. Tiernan: In this case?

The Witness: Yes.

The Referee: Before what notary?

Miss Feld: Louis Summers.

The Witness: I remember it.

Q. (By Miss Feld): Directing your attention to page 5 of that deposition, I am going to read a question to you.

The Referee: Show it to him first, and then ask him.

Miss Feld: All right.

The Referee: Is there a copy of this in the file?

Miss Feld: No. This is the only copy I have.

Q. Mr. Elzer, I am directing your attention to line 7 on page 5, continuing through line 21. Was that question asked you, and was that answer given on that [41] particular day?

A. That's right. I still answer this the same way.

(Testimony of Sidney H. Elzer.)

You could never get an accurate picture. You would just have to figure out what you could.

Miss Feld: This testimony was a little garbled in places.

The Referee: He testified that he was never able to get an accurate picture from the books. Is that right?

The Witness: That's right.

The Referee: I don't see any conflict between the deposition and his testimony.

The Witness: Do you want me to give it in my own words?

The Referee: No. Wait a minute.

Miss Feld: I have no questions.

Mr. Tiernan: No questions.

Well, just another question or two.

Redirect Examination

By Mr. Tiernan:

Q. Mr. Elzer, you knew that Dr. Lands had requested Mr. George Peterson to make a survey or an audit of the books and records after the involuntary petition was filed, did you not?

A. Mr. Fisher wanted one made, so that he could act as attorney for the bankrupt company. They had no audit, and Mr. Fisher wanted one. [42]

Q. Did you ever discuss it with Dr. Lands?

A. No, sir.

Q. Did you ever discuss it with Mr. Peterson?

A. No.

(Testimony of Sidney H. Elzer.)

Q. Who was he?

A. He was an auditor hired approximately the first part of the last year of the business. Originally they had an accountant that never came up with any statement of any kind, and after the business operated about a year on that basis, they fired him and hired Mr. Peterson to install a new system. As long as he worked on them he was bringing them up to date, but he never came up with any statement.

Q. To your knowledge, it was Dr. Lands who requested Mr. Peterson to make this survey?

A. Yes.

Q. But you don't know the result of that?

A. No.

Mr. Tiernan: That's all.

Miss Feld: That's all. Call Mr. Yates.

RALPH J. YATES

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Mr. Yates, what is your occupation? [43]

A. Public Accountant, practicing for the last 30 years in Los Angeles.

Q. Were you retained by the Trustee in this matter to collect certain financial information from the books and records of Universal Produce Company?

A. I was.

(Testimony of Ralph J. Yates.)

Q. What books and records did you use?

A. I used the original books of entry. I couldn't find the general ledger, and so I had then to resort to the original books of entry, the operating statements, financial statements, and had to refer to the entries in connection with the closing of the partnership and the opening or the inception of the corporation.

Q. Have you located the general journal or other corporate records since your survey or audit was made?

A. I have. I have located what we consider a combined cash sales, income and expense journal, and I have worked that back to the inception of the corporation and tied it in with the corporation's first income tax return, and brought up an operating statement up to about January 10th. The statements have been placed upon the books as recorded, and without audit.

Q. Did Dr. Lands or Miss Feld have any of those original records, or do they have any, do you know?

A. Dr. Lands and Miss Feld had a lot of records I couldn't locate, particularly the special bank account and [44] the canceled checks.

Q. Did they have any of the books of the company?

A. Other than the canceled checks, bank statements and this checkbook; that is all I know of.

Q. Incidentally, you were instructed by myself to pay particular attention to the financial condi-

(Testimony of Ralph J. Yates.)

tion of the company at the time Dr. Lands withdrew this \$10,000? A. I attempted to do so.

Q. Did you prepare or have you prepared a statement which shows not only the operation of the company for approximately a year preceding, for the year preceding the filing of the involuntary petition, but also a balance sheet as of the December date?

A. What I have prepared is a balance sheet—I have dated it January 10th, because that happened to be the last entry in the books, but there was no record between December 1st and January 10th, and there appeared to be no change in the financial position as of December 10th or 12th and January 10th. The assets were substantially the same and the liabilities were substantially the same.

Q. As to the assets, did you take the so-called book value of these assets?

A. Yes, I took the book value, rather than any appraised or obsolete value.

Q. You got the assets from the books and [45] also the liabilities from the books?

A. That is correct.

Q. Did your examination show tax liabilities?

A. It does. It shows the tax liabilities as recorded by the books. It does not show the liabilities for the last quarter.

Q. Incidentally, did you run a tape on the verified proofs of debt which are on file in this proceeding?

A. I didn't run a tape, but I ran a rough check

(Testimony of Ralph J. Yates.)

on it, and they are about, I believe, \$88,000 to date, and I believe there is a few more months to go for the remainder to be filed.

The Referee: Does anybody know where the claims are?

Mr. Tiernan: I think they are there, your Honor.

The Witness: In connection with that, I would like to state——

The Referee: Where did you get the information regarding the claims?

The Witness: From your files. The schedule was filed, and on the schedule it says, "Unsecured Claims Unknown."

The Referee: I thought you said you got the information from the claim file.

The Witness: They have got them inside there. There [46] is a list of creditors, with no amounts.

The Referee: Go ahead.

Q. (By Mr. Tiernan): Do your figures include the obligation to Dr. Lands?

A. It includes—yes, it does, because Dr. Lands' claim was included in the general accounts payable control. Speaking of that claim, I would like to qualify that, too. According to the books, Dr. Lands' claim was carried in the accounts payable control, and the money was so badly intermingled here that it is hard to tell which was a loan and which was a repayment, or just exactly what position he is in, because he had the canceled checks.

Q. Did your survey include the name of Mr. Elzer?

(Testimony of Ralph J. Yates.)

A. Yes. It is also in that accounts payable control.

Q. What did your investigation disclose concerning the operating condition of this business for the period February, 1952, to the end of December, 1952?

The Referee: Those operating records should show what the assets and liabilities were.

Mr. Tiernan: In view of the situation, we will have to confine our examination to a discussion of the assets and liabilities. Did you compile a list of those?

A. Yes. [47]

Q. From the books and records? A. Yes.

Q. What was that list?

A. I have, from the books and records, accounts payable, \$96,612.93; taxes, according to the books, \$711.72; accrued expenses, and unpaid salaries have not been set up on the books, and therefore I did not include them in my statement.

Mr. Tiernan: All right.

The Witness: Liabilities included in my statement total \$97,324.65.

Q. (By Mr. Tiernan): Does that include secured obligations and notes or loans payable?

A. That is partially correct. There are some contracts in there. The capital account, according to the books——

The Referee: No, not the capital.

The Witness: Well, the deficit, then, between the assets and liabilities——

(Testimony of Ralph J. Yates.)

The Referee: Have you?

A. No, I haven't. The figure on the assets, cash in bank, one bank, January 10th——

The Referee: We want it for December.

The Witness: Well, I will have to—cash in bank on the 1st of December, an overdraft of \$5,693.20.

The Referee: How about the 12th? [48]

The Witness: The 12th, \$5,904.95.

The Referee: What was that, cash in bank?

The Witness: Overdrawn. It has been that way through the whole——

The Referee: We are talking about December 1st and 12th.

The Witness: The assets were accounts receivable, \$1,560.36 on the 1st, and \$1,232.80 on the 12th. The freight claims were the same, \$14,123.81.

Mr. Tiernan: I want to interrupt a minute. These are the same freight claims as testified to. You can see what the actual value of those are.

The Referee: That doesn't prove anything. We have to have testimony as to the actual value. Go ahead.

The Witness: I am taking it from the books.

The Referee: What are those freight claims?

The Witness: That freight claim is \$32,015.13, and the reserve against freight claims and accounts receivable is \$36,181.80. Those figures are the same, no change on those figures. And the inventories here, \$14,350.42, the same figure on the 1st and the 12th. The fixed assets on the 1st and the 12th were the same, including automobiles and trailers,

(Testimony of Ralph J. Yates.)

\$6,991.38; equipment, \$19,197.29; office furniture and equipment, \$985.60; new equipment purchased during 1952, \$1,256.62; making a total for fixed assets of \$28,390.97, less the depreciation [49] shown on the books of \$2,852.33, which left a net for fixed assets in the amount of \$25,528.54. Other assets, which appear on the books, \$15,115.18; and good will, \$1,680.02.

The Referee: Good will is hardly an asset.

The Witness: Why I am pointing that out, that is the only equity they had when the corporation was formed.

The Referee: What is the total as per the books?

The Witness: As per the books?

The Referee: Yes.

The Witness: \$61,707.26.

Q. (By Mr. Tiernan): As against liabilities of— A. Of \$97,324.65.

The Referee: Go ahead.

The Witness: Leaving a deficit of \$35,617.39.

The Referee: That is as of December 1st and 12th?

The Witness: That's right.

Q. (By Mr. Tiernan): Mr. Yates, did you discuss these figures with Dr. Lands and Miss Feld prior to the hearing? A. I did.

Q. What was the substance of that conversation?

The Referee: I don't see how that is important.

Mr. Tiernan: I want to show that the Doctor admitted—

The Referee: No, that is not material.

(Testimony of Ralph J. Yates.)

It is 12:00 o'clock. [50]

Mr. Tiernan: Does your Honor want to go right on through?

The Referee: We might finish with Mr. Yates, if we can.

Mr. Tiernan: All right. That's all.

Cross-Examination

By Miss Feld:

Q. Mr. Yates, you stated that the figures you were referring to did not take into account the special account of Dr. Lands; is that true?

A. No, I don't believe I said that. If I said that, I didn't mean to. What I meant is this, that the special account of Dr. Lands, I had nothing to check that with. I can see, from what you have introduced here, that all of these items were marked—Dr. Lands transferred it from the special account to the regular account.

The Referee: The answer is that you didn't take that into consideration, because you didn't have any information on the subject, is that right?

The Witness: Yes. The figure I gave took that into account.

The Referee: Where did you get that information?

The Witness: From the books.

The Referee: What did they show?

The Witness: The books show that Dr. Lands passed about 100 transactions—— [51]

(Testimony of Ralph J. Yates.)

The Referee: We are talking about assets.

The Witness: The books show that Dr. Lands put in and took out money on about 100 different occasions, because he had—

The Referee: Can you give us any information as to whether Dr. Lands had any assets that belonged to the corporation on December 1st or 12th, 1952?

The Witness: No. Dr. Lands had no assets.

Q. (By Miss Feld): Mr. Yates, these figures you gave as total assets as of the 1st and 12th of December, can you tell us whether or not the total figure takes into account all the receipts from the peas and tomatoes?

A. Up to that time, yes, that is, according to the books and records.

Q. You haven't any way of telling us at the moment whether the books and records would jibe with the deposit slips that are part of Petitioner's Exhibit 4?

A. Not without checking.

Q. You have no accurate way of knowing what the correct figure is, that your estimate of the assets on these two dates may not be correct?

The Referee: He is going on what the books show. If the books show the contrary, you can have an opportunity to show that. He has given it according to what the books show.

Q. (By Miss Feld): One more question, Mr. Yates. [52] In your opinion, could a layman looking at these books as of a particular date, would he be

(Testimony of Ralph J. Yates.)

able to determine the financial condition of the company? A. No.

Miss Feld: No further questions.

The Referee: Anything further?

Redirect Examination

By Mr. Tiernan:

Q. As a matter of fact, that is generally true of any accounting, isn't it, Mr. Yates? That a layman is not able to——

The Referee: Well, that is unimportant. How does he know? His testimony is from the books, and naturally a layman wouldn't know.

Mr. Tiernan: Thank you, your Honor.

The Referee: Are you through?

Mr. Tiernan: Yes.

The Referee: We will adjourn. But one question that I want to ask is this: Take this agreement, Petitioner's Exhibit 1, Paragraph 3 (a): "The first \$20,000 received or derived or coming in from said crop shall be paid directly to the said Victor George Lands as a return of the new \$20,000 advanced by him."

Evidently that was intended as security. But the fact is he didn't take the first \$10,000. Does that amount to a waiver? You can have your answer ready at [53] 2:00 o'clock.

(Whereupon a recess was taken until 2:00 p.m. of this date.) [54]

Friday, September 11, 1953—2 P.M.

The Referee: All right.

Mr. Tiernan: The first thing I would like to do is file the Amendment.

The Referee: Yes. Have you served a copy on the other side?

Mr. Tiernan: Yes, a copy has been served, and there is a stipulation to the effect that the allegations of the Amendment are denied.

The Referee: All right.

Mr. Tiernan: If the Court please, we would like to offer in these proceedings the report and account of the Receiver, and also the inventory and appraisal, the official appraisal, which is on file, for the purpose of showing that the liquidated value of this estate will not exceed \$28,000.

The Referee: I don't think that is competent. It is too remote.

Mr. Tiernan: It is the only evidence we have to show the liquidated value.

The Referee: You showed by Mr. Yates that the concern was insolvent.

Mr. Tiernan: I wanted to offer that.

The Referee: No.

Mr. Tiernan: All right. Call Mr. [55] Springstead.

WALLACE SPRINGSTEAD

called as a witness on behalf of the Trustee, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tiernan:

Q. Mr. Springstead, what was your position with the company?

A. I was president and manager of the corporation.

Q. Were you familiar with its affairs?

A. Yes, I was.

Q. Directing your attention to the latter part of November, 1952, prior to the time that Dr. Lands withdrew the first \$5000, did you have any conversation with the Doctor with respect to this withdrawal? A. I did, yes.

Q. Tell us where those conversations took place, who, if anyone, was present, and what was said by each of you.

A. I would say most of the conversations were on the telephone between the Doctor and I. The Doctor had borrowed the money from somebody else, and the person he had borrowed the money from was threatening him——

Q. Now, this is the conversation?

A. I am giving the summation of the conversation. And so the Doctor was trying to find a time that was appropriate to withdraw the first \$5000, to quiet his [56] creditors. Upon the withdrawal of either the first or the second \$5000—I am not

(Testimony of Wallace Springstead.)

exactly sure which \$5000 it was—he appeared at the Bank of America and called me and said he was withdrawing the \$5000 from the account. And I kept a running balance on what his account here held, and presumed it was going to be transferred to our account.

The Referee: That isn't conversation. That may go out. All we want is what was said.

The Witness: Between he and I, the conversation was, he wanted to take the \$5000, and I wanted him to put it in the company.

Q. (By Mr. Tiernan): Did you expressly ask him to leave the money in? A. I did.

Q. What did he say?

A. He said he had to have it and he was going to take it.

The Referee: The money was then in the special account, was it?

The Witness: That's right.

Q. (By Mr. Tiernan): Did you tell him what the condition of the company was at that time?

A. I did. I told him our checks would bounce.

Q. What did he say?

A. He said they hadn't been bouncing, and if they did and we went into bankruptcy, he would fix it so I never [57] went into business again.

Q. Then the question of your possible bankruptcy as a result of these withdrawals was discussed by you and the Doctor?

A. I told him that if he took the money out, if he wrote the check to himself instead of to the

(Testimony of Wallace Springstead.)

company, that I would have no choice but to tell the creditors, whom we had been stalling for some time, of the circumstances, and I knew the result would result in bankruptcy, they would file a petition.

Q. Had you been conversing with the Doctor at intervals for the period immediately preceding the withdrawal of the first \$5000?

A. Immediately preceding the withdrawal of the first \$5000 there was no difference of ideas. The Doctor——

Q. You called him and told him——

A. The Doctor was perfectly——

Q. Did you have regular telephone conversations with the Doctor? A. We did.

Q. You requested him to loan the company so much money?

A. I did, and he never objected. He did. He did it every time we asked for it.

Q. About how many times a week did you call the Doctor and talk to him? [58]

A. Sometimes two or three, and sometimes only once. My recollection wouldn't be that close.

Q. Did the Doctor come to San Diego in the period from October to December, 1952?

A. He did whenever it was necessary.

Q. Did he discuss the affairs of the company with you? A. He did.

Q. At the time that the \$5000 was drawn out, that is to say, at both times, was there any corporate meeting or board meeting in connection with

(Testimony of Wallace Springstead.)

that transfer? A. Not to my knowledge.

Mr. Tiernan: I think that is all.

Cross-Examination

By Miss Feld:

Q. Mr. Springstead, isn't it true that this conversation you testified to, the one wherein you told the Doctor that if any money was taken out there might be some possibility of the creditors protesting, isn't it true that that took place after December 12th, after the second \$5000 had been withdrawn?

A. That was the second conversation in that regard. There were three conversations, to be exact.

The Referee: Give us the dates now.

The Witness: On or about—I can only give you on or about. Will that be satisfactory?

The Referee: No. Give it the best you can. [59]

The Witness: The first conversation was on the date of the withdrawal of the second \$5000 check, over the telephone, on a call placed by the Doctor from the Bank of America.

The Referee: The first \$5000?

The Witness: It was either December 1st or December 12th.

The Referee: With relation to that date, when was the conversation?

The Witness: It would be on the withdrawal—either the first or second. I don't remember which one.

The Referee: This conversation was on the withdrawal of the first?

(Testimony of Wallace Springstead.)

The Witness: No. It might have been the second.

The Referee: The second was December 12th.

The Witness: If it is, if it is on the record, it is.

The Referee: You think now that the first one was about December 12th?

The Witness: I wouldn't be able to tell you. It was the first \$5000 or the second \$5000. It is quite a long time.

The Referee: All right.

The Witness: After that there was a discussion with the Doctor in regard to withdrawing another \$10,000, which I objected to because of the condition of the company. [60]

The Referee: What was the date of that; do you remember that?

The Witness: Early in January.

The Referee: Of this year?

The Witness: Yes, sir. Also there was a third conversation, at which I had my attorney present, with respect to this other \$10,000.

The Referee: I don't think that would have any bearing.

The Witness: She asked the question and I was only——

The Referee: I don't think that has any bearing. Go ahead.

Q. (By Miss Feld): Mr. Springstead, to the best of your knowledge, how much money came in from the pea crop after that?

(Testimony of Wallace Springstead.)

A. I would not be able to give you that. The books would reflect it.

Q. Isn't it true that money was coming in for that? A. Yes.

Q. From December 1st on?

A. To the best of my recollection, yes. There was a draft on every car. We were getting advances on every car.

The Referee: Let me ask you this. This agreement—you are familiar with it, aren't you?

The Witness: Yes, I am familiar with it.

The Referee: Petitioner's Exhibit No. 1. [61] That provides that out of the first \$20,000 that comes in, Dr. Lands was at liberty to repay to himself the \$20,000 loan. Do you know why he didn't do that?

The Witness: Yes, I know why.

The Referee: Why didn't he do that?

The Witness: Because there wasn't sufficient funds to operate the company.

The Referee: You mean by that that you wanted him to use the money to operate the company, rather than to pay himself?

The Witness: Yes, sir.

The Referee: Did you have a talk with him about that?

A. Many times.

The Referee: And did he permit you to use the money instead of paying himself?

The Witness: He did.

Miss Feld: I think that is all.

Mr. Tiernan: That is all, thank you.

The Referee: Any other witnesses?

Miss Feld: No. I would prefer to keep Mr. Springstead here, though.

The Referee: Yes. Anything further, Mr. Tiernan?

Mr. Tiernan: I would like to ask Mr. Springstead a few questions that I neglected to ask, if your Honor will indulge me for about three minutes.

The Referee: I will give you two. But we will take a [62] ten minute recess now.

(Ten minute recess.)

Mr. Tiernan: That is all, your Honor. We rest.

Miss Feld: I would like to put Dr. Lands on again.

The Referee: Go ahead.

VICTOR G. LANDS

having been heretofore duly sworn, upon being recalled, testified as follows:

Direct Examination

By Miss Feld:

Q. Dr. Lands, you heard Mr. Yates, the auditor, testify as to the assets and liabilities of the company as of December 1st and December 12th. To the best of your knowledge, there were receipts and proceeds coming in from the crop as of December 1st, and again as of December 12th?

A. To the best of my knowledge, receipts were constantly coming in, and, as cars were being

(Testimony of Victor G. Lands.)

picked and loaded in Baja California, and sold in the East, the advance drafts would be coming in constantly and deposited to my account.

Q. And you knew of these deposits?

A. Yes.

Q. And they are reflected in the check stubs?

A. Yes, and reflected in the ability to withdraw the first \$5000 and the second \$5000. [63]

Q. You heard the conversation Mr. Springstead just testified to, concerned with withdrawal of either the first or second \$5000—he wasn't quite sure when. Do you remember having a conversation with Mr. Springstead about that? A. Yes.

Q. When did that take place?

A. This was on December 12th, or rather, December 12th was—this conversation took place with reference to the second withdrawal. These withdrawals were made with Mr. Springstead's understanding and consent, because it was up to him to deposit the receipts received from the East, and after the first check was withdrawn on the 1st, I questioned him in reference to when it would be possible to withdraw another \$5000 as the receipts were being deposited, and he suggested on or about the 12th. Now, the Saturday before the 12th—I think the 12th was on a Monday—I went down to San Diego with Miss Feld to obtain the money in cash from the Bank of America, and Mr. Jensen, vice president of the Bank of America, or Mr. Barry, who is one of the officers of the Bank of America, was present, either one or both were

(Testimony of Victor G. Lands.)

present. At that particular time I called Wally from the bank, and he was at the office, stating that I was planning to remove another \$5000, and he became quite infuriated and irritated because it was being done two or three days prior to [64] when he anticipated the drafts would be in the bank covering all his current expenses. But there was no question at that particular time of any bankruptcy or any insolvency.

The Referee: That has to go out. It is just what was told to you by Mr. Springstead or anybody connected with the company.

The Witness: Yes.

The Referee: Are you positive that you didn't have any conversation with Mr. Springstead before the 12th?

The Witness: No.

The Referee: Are you positive——

The Witness: I had a conversation.

The Referee: You had a conversation about the withdrawal of your money at the time you took out the first \$5000?

The Witness: No. I mean, there was no objection to that.

The Referee: You had no conversation with him about it?

The Witness: Yes; he knew it was being withdrawn.

The Referee: You mean the first \$5000?

The Witness: Yes.

(Testimony of Victor G. Lands.)

The Referee: Did you tell him about it?

The Witness: Yes.

The Referee: What did he say?

The Witness: I would like to—— [65]

The Referee: What did he say when you told him you were going to take it?

The Witness: It was perfectly all right. The draft would be in the bank and it would be available.

The Referee: Did he say anything about the creditors?

The Witness: No, sir.

The Referee: Did he say anything about creditors or bankruptcy when you drew out the second one?

The Witness: No, sir; emphatically no.

The Referee: Go ahead.

Q. (By Miss Feld): Dr. Lands, with reference to the financial situation of the corporation itself, did you ever see a completed audit or financial statement?

The Witness: No, ma'am.

Q. Did you ever have any conversation with Mr. Springstead concerning a financial statement of the corporation? A. Yes.

Q. Will you tell us when those conversations were and who was present?

A. Well, we had many such conversations, some by telephone and some at meetings where Mr. Elzer and Mr. Springstead and yourself and I were present, and the sum and substance of these con-

(Testimony of Victor G. Lands.)

versations was that we have a most excellent crop of peas in Baja, that they are blooming well, that the market price in the East was excellent, [66] because there were no other crops elsewhere in the United States, and therefore it would bring a high return, that we estimated the number of cars as being approximately 75, at an approximate profit of \$1500 per car, which is in excess of \$100,000.

The Referee: Did you ever look at the books of the corporation along in December, 1952?

The Witness: No.

The Referee: Did you ever look at them at all?

The Witness: No, sir. I took Mr. Springstead's word for the condition of the situation from time to time.

The Referee: Did he tell you anything specific in December about the condition of the corporation?

The Witness: Yes. In late December he expressed concern about the number of cars that were being shipped and loaded. That was in late December.

The Referee: What was his complaint?

The Witness: They weren't reaching his prediction, and that the number of cars actually being shipped fell short of the number he expected to be shipped.

Q. (By Miss Feld): When you speak of late December, when was that?

A. On or about Christmas.

The Referee: What I want to get at is whether

(Testimony of Victor G. Lands.)

anything was said by him to you or anything said by you to Mr. Springstead or anyone at the corporation, between December [67] 1st and December 13th about the financial condition of the corporation. Was anything said? A. No, sir.

Q. (By Miss Feld): Between December 1st and December 13th was anything said about the crops?

A. Yes, they were coming in fine, and the proof was that deposits were being made in the bank. I think the bank statement will show those deposits.

The Referee: What I want to know is what information you got, if any, about the financial condition of this bankrupt between December 1st and December 13th.

The Witness: No information about bankruptcy at all.

The Referee: Information about the financial condition of the corporation, between December 1st and December 13th.

The Witness: Yes. Things were going well; otherwise Mr. Springstead wouldn't have permitted me——

The Referee: Never mind.

The Witness: The only information I received was from Mr. Springstead, and he told me we were shipping the cars and it looked like we would be able to meet our quota. And I kept on badgering him in terms of when could I take my first withdrawal, and he would say, "December 1st would be the proper time." This decision was made in late November. And the decision to withdraw on

(Testimony of Victor G. Lands.)

or about the 12th was made shortly after the first withdrawal.

The Referee: Go ahead. [68]

The Witness: The first I heard of any difficulty was when I attempted to make my third withdrawal.

The Referee: When was that?

The Witness: That was on or about Christmas, in late December.

The Referee: What did you hear at that time?

The Witness: At that particular time, in order to keep whatever crops there were, moving in Baja, Mr. Springstead felt that these funds could not be released, and it was always in terms of the——

The Referee: No. You have answered the question. Anything further?

Miss Feld: Just a minute, your Honor.

Q. (By Miss Feld): Dr. Lands, will you explain to the Court what the reason was for your not withdrawing the first moneys immediately when the first moneys came in?

A. Yes. Those moneys——

The Referee: I don't know that that is a proper question. I have been wondering about this agreement. It is kind of ambiguous. It might be well for me to let you show what the parties intended. It simply says that the first money coming in shall be paid over to him.

Miss Feld: That is exactly what we are trying to show.

(Testimony of Victor G. Lands.)

The Referee: I think the agreement is ambiguous, and I am going to have to let both sides show what the [69] intention of both parties was in this agreement. It raises a lot of questions. Go ahead with your questions.

Miss Feld: Could you read back that question, please?

The Referee: Reframe the question.

Q. (By Miss Feld): I believe I asked you for an explanation of the fact that out of the first money that came into the account, why it was not withdrawn.

A. Yes. The answer is more or less as Mr. Springstead stated. He needed money to keep harvesting the crop.

The Referee: In other words, he requested you to let the company use the money instead of taking it, and you consented?

The Witness: That is correct. And there was a meeting held in San Diego at the offices——

The Referee: When?

The Witness: In November.

The Referee: 1952?

The Witness: Yes.

The Referee: Go ahead.

The Witness: At which meeting Mr. Springstead, Mr. Elzer, Miss Feld and myself were present. And at that particular time Mr. Springstead requested that I withhold withdrawing of moneys until such date as the crop situation was rectified, and I consented reluctantly.

(Testimony of Victor G. Lands.)

Mr. Tiernan: I didn't get the date of that. [70]

The Witness: In November. It was the early part of November.

Q. (By Miss Feld): Was there a specific amount of money that you were supposed to let ride before you would touch the money?

A. Yes. Mr. Springstead wanted another \$15,000 accumulated before I would withdraw any money, and then as soon as those moneys were accumulated I requested Mr. Springstead for the first allotment.

Q. Was that the general agreement?

A. Yes.

The Referee: Of course, a written agreement can be modified by an executed oral agreement.

Miss Feld: Nothing further.

Cross-Examination

By Mr. Tiernan:

Q. Dr. Lands, you testified that at the time you withdrew the first \$5000 you went to the Bank of America in company with your attorney?

A. No, I didn't.

Q. Was that the second time?

A. That's right.

Q. Did you go personally to the bank?

A. Yes.

Q. On the first withdrawal? A. No. [71]

Q. Dr. Lands, you didn't make any notations in

(Testimony of Victor G. Lands.)

the checkbook as to the balance in the account every time you drew a check, did you?

A. No, I did not. I took Mr. Springstead's word that there was a certain amount in the bank, and any time when he requested me to write a check I said, "Have you got that much in the account," and he would say, "Yes, we have some such and such a draft," depending on the cars being shipped to the East.

Q. You can see from this bank statement, referring to the period from December 1 through December 12, that these two items I have checked are the two \$5,000 checks, and you can see, as a result of this withdrawal, the first withdrawal, the bank balance was reduced to \$520, and that, as a result of the second withdrawal, the balance in the bank was only \$11.86.

A. As you go on further, you have that situation existing right from the beginning.

The Referee: How would that affect the situation, if he had a lien on this money?

Mr. Tiernan: If he had a lien on it, it wouldn't affect the situation at all.

The Referee: But until the money came into his hands he had no lien. In other words, the accounts were never assigned, and, even if they had been, there was no compliance with the Code. So if this money didn't get into [72] the special account, how could he have a lien on it?

Mr. Tiernan: I have no further questions in connection with it.

(Testimony of Victor G. Lands.)

The Referee: Now, this money that was withdrawn by the Doctor I don't think comes under Sections 824, 825, and 826 of the Corporation Code. It wasn't a distribution of assets. It was simply a repayment of a loan, out of the special account, on which he claimed a lien. It wasn't a distribution of assets. I am not particularly satisfied that when this money was withdrawn the Doctor might have had reasonable cause to believe that the concern was insolvent when he made this withdrawal.

Mr. Tiernan: As a matter of law, an officer and director is chargeable with knowledge.

The Referee: A man in the position he is in here, he didn't have anything to do with the operation of the corporation. An active officer would be but—Have you got any case on that?

Mr. Tiernan: No. I am preparing to submit a memorandum of law, your Honor.

The Referee: Do you want to argue it now or submit it on briefs?

Mr. Tiernan: I prefer to submit it.

The Referee: It is beginning to look to me that the Doctor is entitled to keep the \$10,000. How much time do you want? [73]

Mr. Tiernan: Who do you want to file the opening brief?

The Referee: Miss Feld should, I think.

Mr. Tiernan: Yes. How much time?

Miss Feld: Ten days.

The Referee: Ten, ten and five.

Mr. Tiernan: That is satisfactory. I just wanted

(Testimony of Victor G. Lands.)

to ask Mr. Springstead whether he has any recollection of this meeting in San Diego.

The Referee: You mean in November?

Mr. Tiernan: Yes.

The Referee: Go ahead.

Mr. Tiernan: Do you have any recollection of it, Mr. Springstead?

The Witness: No.

Miss Feld: I was present at this meeting and will testify to it.

Mr. Tiernan: I will stipulate that you will support that statement.

The Referee: You stipulate that if Miss Feld testified she would testify the same as Dr. Lands regarding this meeting.

Dr. Lands: Mr. Elzer was present too, sir.

Mr. Tiernan: Okay.

The Referee: All right. [74]

Certificate

I, C. W. McClain, hereby certify that on the 11th day of September, 1953, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Reuben G. Hunt, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcription of my stenographic notes thereof.

Dated at Los Angeles, California, this 6th day of October, 1953.

/s/ C. W. McCLAIN,
Official Court Reporter.

[Endorsed]: Filed October 8, 1953, Referee. [75]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 115, inclusive, contain the original Petition for Involuntary Bankruptcy; Order of General Reference; Petition to Reclaim Property; Petition for Order to Show Cause re Preference and Fraudulent Conversion; Answer to Petition for Order to Show Cause re Preference and Fraudulent Conversion; Answer to Petition to Reclaim Property; Amendment to Petition for Order to Show Cause re Preference and Fraudulent Conversion; Memorandum of Facts, Law, Points and Authorities; Brief of Trustee in Support of Preference and Fraudulent Conveyance; Reply Brief of Victor G. Lands; Memorandum Opinion re Status of Dr. Victor G. Lands; Two Objections and Corrections to Findings of Fact, Conclusions of Law and Order; Findings of Fact, Conclusions of Law and Order; Petition for Review of Referee's Order of December 22, 1953; Certificate on Review; Petitioner's Exhibit No. 1; Supplemental Certificate on Review; Memorandum; Order Denying Petition for Review

and Affirming Order of Referee; Notice of Entry of Order; Notice of Appeal; Statement of Points on Appeal and Designation of Record on Appeal which, together with Reporter's Transcript of Proceedings on September 11, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of June, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14401. United States Court of Appeals for the Ninth Circuit. Victor G. Lands, Appellant, vs. Kyle Z. Grainger, Jr., Trustee in Bankruptcy of Estate of Universal Produce Company, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed June 24, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14401

VICTOR G. LANDS,

Appellant,

vs.

KYLE Z. GRAINGER, JR., Trustee in Bankruptcy
of the Estate of Universal Produce Company,
Bankrupt,

Appellee.

APPELLANT'S STATEMENT OF POINTS

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

Pursuant to Rule 17 (6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant, Victor G. Lands, hereby adopts the Statement of Points Upon Which He Intends to Rely heretofore filed with the District Court of the United States, for the Southern District of California, Central Division, and constituting pages 110 through 112 of the record herein, and hereby designates for printing the following documents on the following pages of the record docketed in the above-entitled court:

* * *

Dated: June 24, 1954.

/s/ VIVIAN M. FELD,
Attorney for Appellant.

[Endorsed]: Filed June 25, 1954.